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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1998

ROSALINDA L. PEREZ, et al.,
Petitioners,

v.

PASADENA INDEPENDENT
SCHOOL DISTRICT, et al.,
Respondents.

**ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

PETITION FOR WRIT OF CERTIORARI

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fo.

QUESTION PRESENTED FOR REVIEW

In a case under Section 2 of the Voting Rights Act, 42 U.S.C. §1973, are Hispanic Plaintiffs limited to producing **only** a single-member district containing a majority of Hispanics voting age citizens, to the exclusion of all other evidence, to show the "geographic insularity" requirement of *Thornburg v. Gingles?*

PARTIES TO THE PROCEEDINGS

ROSALINDA L. PEREZ, DOLORES E. GARCIA, MAGGIE RAMIREZ, ZINA GONZALES, MARIA GONZALES, CELESTINO M. PEREZ, JR., JENKY M. DIAZ, DAVID R. SEGURA, RUDY N. TREVINO, ROBERT MARTINEZ, YVONNE RUTH, PASADENA CITIZENS FOR EQUITABLE REPRESENTATION,
Petitioners,

v.

PASADENA INDEPENDENT SCHOOL DISTRICT, CARMEN OROSCO, DENNY DELAFIELD, VICKIE MORGAN, BOB BLAIR, MARSHALL KENDRICKS, HARVEY TURNER, JOHN ELAM,
Respondents.

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The opinion of the Court of Appeals is reported at 165 F.3rd 368 (5th Cir. 1999), and is included in the Appendix hereto at App. 1. The opinion of the district court is reported at 958 F. Supp. 1196 (S. D. Tex. 1998) and is reprinted at App. 16a.

JURISDICTION

The Court of Appeals entered its judgment on January 29, 1999. This petition for writ of certiorari is filed within 90 days of the judgment of the Court of Appeals. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The statutory provision involved in this case is Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, the text of which is reprinted at App. 94a.

STATEMENT OF THE CASE

Petitioners are Mexican American residents, citizens, and voters of the Pasadena Independent School District, ("Pasadena I.S.D."). Petitioners contend that the at-large election system used to elect trustees to the Pasadena I.S.D. dilutes Hispanic voting strength in violation of Section 2 of the Voting Rights Act, 42 U.S.C. § 1973. The Pasadena I.S.D. is a school district organized under the laws of the State of Texas. (App. 2a.) Its territory comprises approximately eighty-five square miles and is located in the southwestern part of Harris County, Texas. *Id.* The school district includes all of the cities of South Houston and

Pasadena as well as parts of the City of Houston. *Id.*. According to the 1990 census just under 190,000 persons live in the Pasadena I.S.D. *Id.* Approximately 30% of the total population of the school district is Hispanic and about 4% is African American. *Id.*

The school district is governed by a seven-member Board of Trustees. (App. 3a.) All Trustees are elected on a non-partisan basis, by numbered posts, for overlapping three-year terms so that in one year two will be elected, in the next year two more will be elected, and in the third year three will be up for election. *Id.* Single shot voting is not allowed. (App. 4a.) Although the school district is large, only four polling places are utilized for elections. (App. 85a.) In the history of Pasadena I.S.D., only one Hispanic and no African American has ever been elected or appointed to the governing board of the school district. (App. 3a, 48a, 90a.)

A. *The Decision of the District Court.* Following a trial in which the parties presented evidence from May 31, 1995 through June 8, 1995 and on February 10, 1997, the district court entered an opinion and judgment in favor of defendants on March 13, 1997. In applying *Thornburg v. Gingles,* 478 U. S. 30, 50-1 (1986), the district court found that Petitioners failed to establish the first element of the *Gingles* threshold factors because they did not show that it is possible to draw one or more districts in the Pasadena I.S.D. with a majority Hispanic *citizen* voting age population. (App. 4a, 6a.) The districting plans submitted by Petitioners contained one or two (depending on the plan) districts with majority Hispanic population and majority Hispanic voting age population. (App.30a-32a.) When updated with 1995, 1996, 1997, and 1998 population projections, the districts also contained majority Hispanic citizen voting age population. (App. 89a.) Finally, the putative districts were located in

geographic areas where single-member districts from other jurisdictions, with similar demographic composition, had consistently elected Hispanic candidates, and where a majority of the election day voters were Hispanic. Tr. Vol. II, p. 18, Tr. Vol. III, pp. 87- 101. (App.10a-11a.) The district court, however, held that this evidence did not, as a matter of law, satisfy the first prong of *Gingles*, and instead applied a "bright-line" test based on the proposition that only by establishing that the putative districts contained a majority of Hispanic citizen voting age population could plaintiffs meet the *Gingles* threshold requirement. (App. 8a.)

Despite this ruling, the district court proceeded to examine the remaining elements of the *Gingles* factors and the totality of circumstances. (App. 7a.) The district court found that Hispanics voted cohesively in both Pasadena I.S.D. elections and exogenous elections. *Id.* The district court also examined polarized voting evidence and found that while Hispanic voters were cohesive in their support for Hispanic candidates, "Anglo voters generally had not voted for Hispanic candidates in the PISD elections." (App. 7a, 69a.)

The district court evaluated the totality of circumstances and found that Petitioners had raised valid concerns that Hispanic citizens' participation in the school district elections was hindered by voting barriers. (App.7a.) Among the most prominent of the voting barriers found were: the use of a small number of polling places, inconveniently located with respect to where the Hispanic population is concentrated (four polling places); the absence of minority elected officials ("Hispanics have consistently been under-represented on the PISD Board, by an average of 19.1% between 1980 and 1995. This degree of under-representation was higher in 1995...than in 1980..."); the absence of minority election officials (of 461 persons appointed to

conduct PISD elections between 1970 and 1992, 3 or 0.64% were Hispanic); and the operation of a slating committee (only one Hispanic ever received support of slating group that "played significant role in campaigns of successful candidates."). (App. 69a-74a.) Despite its conclusion that the at-large election system disadvantaged Hispanic voters in a number of important ways, the district court felt constrained to find no Section 2 violation because of its view that, as a matter of law, no violation could be found because Hispanics appeared to comprise just under 50% of the *citizen* voting age population, according to the 1990 census, of the *Gingles I* demonstration district. (App. 87a.)

B. *The Opinion of the Court of Appeals.* The court of appeals affirmed, holding that: "The district court therefore correctly required that Plaintiffs demonstrate that Hispanics would represent a majority of voting-age citizens in a proposed district." (App. 10a.) In rejecting Petitioners' argument that a more flexible standard of requiring a showing that Hispanics would comprise a sufficient majority in a proposed district to have the potential to elect candidates of their choice, the Court of Appeals determined that "evidence that the group may succeed in electing preferred candidates [from the putative district] cannot remedy its failure to meet the *Gingles* threshold." (App.11a.)

REASONS FOR GRANTING THE WRIT

This case presents substantial questions involving the application of Section 2 of the Voting Rights Act and the meaning of the first *Gingles* threshold element. The rule applied by the Fifth Circuit on this issue is new. Neither that Court, nor most of the other Courts of Appeals, had previously applied such a rigid standard to the first *Gingles* precondition. The new rule of the Fifth Circuit forecloses any

Section 2 cause of action even when politically cohesive Hispanic citizens can establish that a challenged election system dilutes their voting strength and even when a feasible electoral alternative to the challenged structure is possible. Moreover, the new rule of the Fifth Circuit conflicts with the decisions of this Court and those of other Circuit Courts. Finally, the new rule of the Fifth Circuit is inconsistent with the intent of the Congress in its enactment of the amendments to Section 2 of the Voting Rights Act in 1982.

I. The New Rule Established by the Decision Below for Evaluating Plaintiffs' Evidence on the *Gingles I* Threshold Factor Forecloses Section 2 Challenges in an Important Class of Cases.

The Court of Appeals, addressing the first *Gingles* question of whether the minority group is large and compact enough to form a single-member district, ruled that only by producing a district in which Hispanics comprise a majority of the citizen voting age population of the district could the plaintiffs prevail under Section 2 of the Voting Rights Act. (App. 5a). The Court of Appeals held that even "...evidence that the group may succeed in electing preferred candidates [from the putative district] cannot remedy its failure to meet the *Gingles* threshold." (App. 11a.)[1]

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[1] More recently the Fifth Circuit confirmed its adoption of a "bright-line" test requiring that *Gingles I* may **only** be met by the creation of a district with majority Hispanic citizen voting age population. *Valdespino v. Alamo Heights Independent School District*, ___F.3d ___, (5th Cir. 1999), Cause Number, 98-50227, Slip Opinion, March 11, 1999, pp. 8-11, (After explaining Plaintiffs' argument that the first *Gingles* factor should not be applied in a mechanical, "bright-line" fashion, the Court of Appeals held: "All those complaints are baseless. In reality, this

Prior to the decision below, the Fifth Circuit followed a standard that focused on whether Section 2 plaintiffs could establish that they possessed the ability to elect candidates of their choice absent the challenged structure. *Campos v. City of Baytown, Texas,* 840 F.2d 1240, 1244 (5th Cir. 1988) (reviewed total population to determine whether plaintiffs possessed the potential to elect candidates of choice); *Brewer v. Ham*, 876 F.2d 448, 452 (5th Cir. 1989)("The appellants had the burden to prove the existence of a single-member district in which they could elect candidates of their choice."); *Westwego Citizens v. City of Westwego*, 946 F.2d 1109, 1117 n.10 (5th Cir. 1991) ("As we held in *Westwego, II*, it is entirely proper to refer to evidence other than census data to establish the 'potential to elect'"); *Campos v. City of Houston*, 113 F.2d 544, 548 (5th Cir. 1997)(citizen voting age population important to determine whether minority group possesses the potential to elect candidates of their choice.).

The Court of Appeals in this case adopted a "bright-line" test that may **only** be met by showing with census data that Hispanics exceed 50% of the citizen voting age population of the demonstration district submitted by plaintiffs to satisfy their burden under *Gingles I.* (App.10a.) Thus, as occurred here, Hispanic plaintiffs who establish in a Section 2 case that, in the totality of circumstances, a challenged election structure dilutes their ability to vote and that a district can be drawn in which the minority group will have the ability

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Appeals held: "All those complaints are baseless. In reality, this court has interpreted the *Gingles* factors as a bright-line test....**Given that the Supreme Court has avoided the issue** of what population to use for the first *Gingles* factor, and other circuits have used the same approach as *Campos,* the district court used the correct legal test here."(footnotes omitted, emphasis added)).

to elect candidates of its choice, will nevertheless be foreclosed from pursuing their claims. This is particularly troubling as the next decennial census approaches. The potential for mischief is significant.

It is now well settled that the *Gingles* threshold factors apply to Section 2 challenges to single-member redistricting plans as well as to challenges to multi-member and at-large election systems. *Growe v. Emison*, 507 U. S. 25, 40-41 (1993). Therefore, Hispanic citizens wishing to challenge election systems, including districting plans developed as a result of the publication of the year 2000 census, will be obliged, in the Fifth Circuit, to first establish that it is possible to develop districts with majority Hispanic *citizen* voting age population. (App.10a-11a.) No other manner of proof to show that it is possible to draw a potential remedy district will suffice. *Id.* The districting process will likely begin, with most jurisdictions, upon the publication of the 2000 census in early 2001. Yet, citizenship data is not made available until after the redistricting process is completed. *Barnett v. City of Chicago*, 969 F. Supp. 1359, 1409 (N.D. Ill. 1997) *aff'd in part, vacated in part on other grounds*, 141 F.3d 699 (7th Cir. 1998). *See Johnson v. DeGrandy*, 512 U.S. 997, 129 L.Ed.2d 775, 797 n.18 (citizen voting age population not available at trial). Politically cohesive Hispanic citizens in the Fifth Circuit will, therefore, be foreclosed from any challenge under Section 2 of the Voting Rights Act to gerrymandered redistricting plans for several years while they await the publication of citizenship data, regardless of the size and concentration of the minority community.

Moreover, politically cohesive Hispanic citizens who may not be able to demonstrate, even after the publication of citizenship data, the ability to draw a majority Hispanic

citizen voting age population district, but who nevertheless can show that a viable electoral alternative exists (a district in which they actually have the potential to elect candidates of their choice) will be forever foreclosed from challenging, under Section 2, even the most blatant racial gerrymandering in districting plans or discriminatory at-large election systems. Numerous reasons may explain why a politically cohesive and geographically insular Hispanic community may not be able to draw a district with 50% or greater Hispanic citizen voting age population. First, citizenship census data is based upon sample data, rather than the actual headcount used for redistricting. *Barnett*, 969 F. Supp. at 1409. Second, citizenship data is only available at the block group level rather than the block level upon which redistricting is based. *Id.* Therefore, citizenship census data required by the Fifth Circuit to prove the *Gingles* factor is less reliable than the actual count used for redistricting. *Id.* Thus, the inability to draw a so-called majority Hispanic citizen voting age population district may have more to do with the unreliability of the data than with past and present reality. Yet, data generally useful in determining whether the Hispanic community possesses the potential to elect candidates from a putative district is useless under the Fifth Circuit's test. For example, even if plaintiffs, as was done here, establish through election data that the submitted districts provide Hispanics with the potential to elect candidates of their choice, under the Fifth Circuit's rule such evidence cannot "remedy [plaintiffs] failure to meet the *Gingles* threshold." (App. 11a.) This standard, if followed generally, would allow jurisdictions to freely gerrymander cohesive Hispanic communities, and would leave Hispanic citizens in many at-large jurisdictions without recourse under Section 2 of the Voting Rights Act.

Certiorari should be granted because the decision of the court of appeals has foreclosed an important cause of action under Section 2 of the Voting Rights Act to Hispanic citizens who will be left with no recourse to remedy even clearly gerrymandered districting plans and clearly discriminatory at-large election systems.

II The Decision Below Conflicts with the Decisions of this Court and those of other Circuits.

The Fifth Circuit established a "bright-line" test that **only** by producing a single-member district with majority of Hispanic citizen voting age population may an Hispanic plaintiff establish the *Gingles I* threshold factor that a minority group be sufficiently large and geographically compact to form a majority in a single member district. (App. 10a-11a.) This harsh holding conflicts with the rulings of this Court and is contrary to the decisions of other Circuits.

This Court first elaborated on the basic analytical framework established for evaluating a claim under Section 2 in *Thornburg v. Gingles*, 478 U.S. 30, (1986). In *Gingles*, the Court provided some structure to the statute's "totality of circumstances" test in a case challenging North Carolina's legislative districts. *Gingles*, 478 U.S. at 47-51. The Court listed the factors outlined in the Senate Report concerning the 1982 amendments to the act and held:

> Under a "functional" view of the political process mandated by §2,...the most important Senate Report factors bearing on §2 challenges to multimember districts are "the extent to which minority group members have been elected to public office in the jurisdiction" and the "extent to which voting in the elections of

> the state or political sub-division is racially polarized"...If present, the other factors,...are supportive of, but *not essential* to, a minority voter's claim. *Gingles*, 478 U.S. at 48 n.15. (Citations omitted)

This Court also identified three threshold factors generally necessary to prove a Section 2 claim:

> Stated succinctly, a bloc voting majority must *usually* be able to defeat candidates supported by a politically cohesive, geographically insular minority group. *Gingles*, 478 U.S. at 49.

This Court described a "geographically insular minority group" as a minority group that could comprise a majority in a single-member district. *Gingles*, 478 U.S. at 50. This Court reasoned that this factor was important to show that the minority group had the potential to elect candidates of their choice absent the challenged election structure. *Gingles*, 478 U.S. at 50 n.17. This Court has since recognized that the *Gingles* factors, including the geographically insular factor, should not be mechanically applied. *Voinovich v. Quilter*, 507 U.S. 146, 158. (1993). The Court has also recognized that in some instances the geographic insularity factor would have to be modified to account for districts in which minority voters could elect candidates of choice with the help of cross-over white voters, in less than majority-minority districts. *Id.* In fact, this Court recognized that even the question of what benchmark data is appropriate for evaluating the *Gingles* threshold factor is unsettled. *Growe*, 507 U.S. at 38 n. 4. Even so, the Court recognized that in some communities, minority voters disadvantaged by at-large election systems may not need super-majorities in a single-member district in

order to elect candidates of their choice. *Gingles*, 478 U.S. at 89 n.1 (O'Connor concurring in judgment); *Johnson v. DeGrandy*, 512 U.S. 997, 129 L.Ed.2d 775, 788-790 (1994). *See Bush v. Vera*, 517 U.S. 952, 135 L.Ed.2d 248, 273 (1998) ("[T]he complexity of the districting process, [is] such that bright-line rules are not available.").

Clearly the new rule of the Fifth Circuit, establishing a mechanical "bright-line" test for evaluating the *Gingles I* threshold factor is inconsistent with the teachings of this Court that Section 2 claims be evaluated in a searching, functional, and comprehensive canvassing of the relevant facts.

The decision of the Court of Appeals is also contrary to the decisions of other federal courts. In *Sanchez v. State of Colorado*, 97 F.3rd 1303, 1311 (10th Cir. 1996), the court determined that the first *Gingles* factor required the plaintiff to show that a reasonable alternative exists to the challenged structure. In determining plaintiffs had met their burden under *Gingles I* by submitting a plan with just over 50% Hispanic voting age population the court reasoned that "[b]ecause *Gingles* advances a functional evaluation of whether the minority population is large enough to form a district in the first instance, the Circuits have been flexible in assessing the showing made for this precondition." In *Solomon v. Liberty County, Florida*, 899 F.2d 1012, 1018 n. 7 (11th Cir. 1990) the en banc court of the Eleventh Circuit determined that while voting age population is one accurate measure of the potential for a minority group to elect their own candidates, a minority group that cannot establish that it is an absolute majority of a single-member district may still bring an action under the Voting Rights Act so long as it can demonstrate that it has the potential to elect in its demonstration district. ("So long as the **potential exists that a minority group could elect its own representative** in spite

of racially polarized voting, that group has standing to raise a vote dilution challenge under the Voting Rights Act.") (emphasis added). *But cf. Negron v. City of Miami*, 113 F.3d 1563, 1571 (11th Cir. 1997). (Holding that citizen voting age population should be considered, under certain circumstances, to determine whether minorities are geographically insular.) In *Barnett v. City of Chicago*, 969 F. Supp. 1359,1409 (N.D. Ill.,1997) *aff'd. in part, and vacated on other grounds*, 141 F.2d 699 (7th Cir.1998), the court specifically rejected the use of citizen voting age population as the exclusive measure for evaluating the plaintiffs' evidence as to the *Gingles I* factor. In *Uno v. City of Holyoke*, 72 F.3rd 973, 985-86 (1st Cir. 1995), the court approved a finding that plaintiffs had met the *Gingles I* requirement by producing an Hispanic majority voting age population district and by showing that such district consistently elected Hispanic candidates. These federal courts have thus consistently examined the *Gingles I* requirement in a flexible and functional approach, in contrast to the rigid approach employed by the Fifth Circuit.

The reasoning of these courts is consistent with this Court's instruction in *Gingles*. The importance of the geographic insular minority group issue is related to the ability of a plaintiff to show that the challenged structure is at the root of the discrimination by demonstrating that a reasonable alternative exists:

> Unless minority voters possess the *potential to elect* representatives in the absence of the challenged structure or practice, they cannot claim to have been injured by the practice. *Thornburg v. Gingles*, 478 U.S. 30, 50-51 n.17 (emphasis added).

The focus has thus been on whether the minority group is concentrated enough to benefit from a geographical districting scheme, without restricting how that may be proved. *See, e.g., Solomon*, 899 F.2d. at 1018 n. 7 ("This holding should not be read to imply an opposite result where blacks do not constitute an outright majority of the voting age population in any district. So long as the potential exists that a minority group could elect its own representative..."); *Sanchez*, 97 F.3rd. at 1314-1315 ("As we have noted, satisfaction of the first precondition requires plaintiffs show a majority-Hispanic district is feasible; a remedy is possible. The evidence surely established the Hispanic population is "sufficiently large," the current district including 48.82% Hispanic population."). *See also*: Blacksher and Menefee, "From *Reynolds v. Sims* to *City of Mobile v. Bolden*: Have the White Suburbs Commandeered the Fifteenth Amendment," 34 Hastings L.J. p.58 (1982).

The Fifth Circuit's approach, on the other hand, overemphasizes and oversimplifies the point by focusing on the assumption that because only citizens have the right to vote, citizen voting age population should be used as the exclusive benchmark for evaluating whether a reasonable remedy is available. (App. 10a.) *Campos v. City of Houston*, 113 F.3d 544, 547 (5th Cir., 1997)("only voting age persons who are United States citizens can vote"). Such an approach, while perhaps easier for a district court to administer, is inconsistent with *Gingles* and with the intent of Congress, as well as contrary to the rulings of other federal courts.

Certiorari should, therefore, be granted because the decision of the Fifth Circuit is contrary to the decisions of this Court and other federal courts, and this Court's guidance is the only way to resolve the question of the appropriate measures for evaluating plaintiffs' evidence that the minority

group is sufficiently large and geographically compact to form a majority in a single-member district.

III. The Decision of the Court of Appeals is Inconsistent with the Intent of the Congress in the 1982 Amendments to the Voting Rights Act.

In amending Section 2 in 1982, one of Congress' primary concerns was the potential for vote dilution through the use of at-large elections. S. Rep. No.417, 97th Cong., 2d Session. 30 (1982)(Section 2 was designed to reach discriminatory "election system features such as at-large elections"). Moreover, the Congress never intended that in evaluating the impact of an election structure "any particular number of factors be proved." S. Rep. No.417, at 29. In fact, the Congress endorsed the approach applied by this Court in *White v. Regester*, 412 U.S. 755,769-770 (1973) that the question whether the political processes are "equally open" depends upon a searching practical evaluation of the "past and present reality." *Id.* The Congress in amending Section 2 adopted a functional view of evaluating vote dilution rather than the formalistic approach adopted by the Court of Appeals. S. Rep. 417, at 30 n.120. This Court has recognized the Congressional intent that Section 2 evaluations should be guided by a comprehensive, rather than mechanical and limited evaluation. *Johnson v. DeGrandy*, 129 L.Ed.2d at 791("conclusions about equality or inequality of opportunity were intended by Congress to be judgments resting on comprehensive, not limited, canvassing of relevant facts.).

The record here established that the plaintiffs submitted a reasonable alternative to the discriminatory at-large election system, *i.e.*, districts that afforded Hispanics an opportunity to elect candidates of their choice. The plans

submitted by the Hispanic citizens contained one or two districts with majority Hispanic population and majority Hispanic voting age population. (App. 6a, 30a-32a.) The unrefuted record demonstrates that single member districts from other jurisdictions, in the same geographic area as the putative districts and with virtually identical Hispanic population concentrations, had consistently elected Hispanic candidates. (Tr. Vol. II. pp. 25-27; Tr. Vol. III. pp. 87-95). Moreover, the uncontested record shows that a single-member district for the City of Pasadena containing almost identical Hispanic population concentrations had in the 1995 city elections, produced a majority Hispanic turn-out. (Tr. Vol. III. pp. 93-94). [2] In spite of this record, the Fifth Circuit determined that because plaintiffs' putative district did not contain a majority Hispanic citizen voting age population "evidence that the group may succeed in electing preferred candidates [from the demonstration districts] cannot remedy its failure to meet the *Gingles* threshold." (App.11a.) Such a mechanical approach to evaluating plaintiffs' Section 2 claim subverts the intent of the Congress, and therefore, Certiorari should be granted.

The Fifth Circuit's analysis under *Gingles* was based upon an improper legal standard that has foreclosed an important protection of the Voting Rights Act to Hispanic

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[2] This record is consistent with the experience of Hispanics across Texas where Hispanic representation in single-member districts with Hispanic populations of 50-59.9% increased between 1980 and 1989 from 54.3% to 80.0%. Robert Brischetto, David R. Richards, Chandler Davidson, and Bernard Grofman, "Texas" in "Quiet Revolution In the South"(C. Davidson & B. Grofman eds., 1994) p.262.

citizens, is inconsistent with the decisions of this Court and those of other circuit courts, and with the intent of the Congress when it amended the Voting Rights Act in 1982.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

[Filed January 29, 1999]

Nos. 97-20345, 97-20489

ROSALINDA L. PEREZ; DOLORES E. GARCIA; MAGGIE RAMIREZ; ZINA GONZALES; MARIA GONZALES; CELESTINO M. PEREZ, JR.; JENKY M. DIAZ; DAVID R. SEGURA; RUDY N. TREVINO; ROBERT MARTINEZ; YVONNE RUTH; PASADENA CITIZENS FOR EQUITABLE REPRESENTATION, Plaintiffs-Appellants,	)
v.	)
PASADENA INDEPENDENT SCHOOL DISTRICT; CARMEN OROSCO; DENNY DELAFIELD; VICKIE MORGAN; BOB BLAIR; MARSHALL KENDRICKS; HARVEY TURNER; JOHN ELAM, Defendants-Appellees.	)

DISPOSITION: AFFIRMED.

Before KING, Chief Judge, and JONES, and SMITH, Circuit Judges.

OPINION BY: KING, Chief Judge:

Plaintiffs-appellants, Hispanic residents of the Pasadena Independent School District and an unincorporated association consisting of individual plaintiffs-appellants, allege that the at-large election system used by defendants-appellees, Pasadena Independent School District and members of its board of trustees, for choosing school trustees violates Section 2 of the Voting Rights Act of 1965, *42 U.S.C. § 1973* (1994) (as amended). The district court found no violation and entered judgment in favor of defendants-appellees. We affirm.

I. FACTUAL & PROCEDURAL BACKGROUND[1]

Defendant-appellee Pasadena Independent School District (the PISD) is a political subdivision of the State of Texas that covers approximately eighty-five square miles in the southwestern part of Harris County, Texas. The PISD includes the cities of Pasadena and South Houston, portions of Houston, and unincorporated areas. The 1990 census found that approximately 190,000 people live in the PISD and that sixty-two percent of the total population are Anglo, thirty percent are Hispanic, and four percent are African-American.

During the 1991-1992 school year, the PISD had

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[1] The district court's thorough and well-reasoned opinion provides a comprehensive review of the facts and procedural history. See *Perez v. Pasadena Indep. Sch. Dist., 958 F. Supp. 1196, 1202-08 (S.D. Tex. 1997)*. We therefore summarize only those facts necessary for the disposition of this appeal.

approximately 38,671 students attending fifty-one schools. Forty-nine percent of these students were Anglo, forty-two percent were Hispanic, and five percent were African-American.

The PISD is governed by the Pasadena School Board of Trustees (the Board), which consists of seven members who are elected at-large by voters residing in the PISD. Two or three positions are filled each year; each trustee runs for a specific position on the Board and is elected by a plurality of the votes cast for that position. The individual defendants-appellees were the elected members of the Board in 1992. Only one member of the Board is Hispanic.

Plaintiffs-appellants (plaintiffs), Hispanic residents of the PISD and an unincorporated association consisting of individual plaintiffs, filed this suit in the United States District Court for the Southern District of Texas on November 19, 1992, alleging that the PISD's at-large election system deprives Hispanics of an equal opportunity to participate in the political process in violation of Section 2 of the Voting Rights Act of 1965, *42 U.S.C.* § *1973* (1994) (as amended),[2]

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[2] Section 2 provides in relevant part:

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color. . . .

(b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation

and the Fourteenth and Fifteenth Amendments.[3] Plaintiffs claimed that Hispanic participation in the Board elections is limited by the use of staggered terms without single-shot voting, the large population of the district, the comparatively small number of polling places, the absence of minorities as election officials, and economic disparities between the Anglo and minority communities. Plaintiffs sought a declaratory judgment finding the existing at-large election method unlawful and an injunction preventing any further elections using the at-large method.

The parties presented evidence to the district court from May 31, 1995 through June 8, 1995. The district court heard additional argument and evidence of subsequent demographic changes on February 10, 1997 and entered an opinion and judgment in favor of defendants-appellees (defendants) on March 13, 1997.

The district court found that to prevail on their claim under Section 2, plaintiffs must meet the three-part test set forth in *Thornburg v. Gingles,* 478 U.S. 30, 92 L. Ed. 2d 25, 106 S. Ct. 2752 (1986):

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by members of a class of citizens ... in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. *42 U.S.C. § 1973.*

[3] The district court dismissed plaintiffs' Fourteenth and Fifteenth Amendment claims after finding insufficient evidence of intentional discrimination. *See Perez*, 958 F.Supp. at 1230. Plaintiffs do not appeal the dismissal of these claims.

> First, "that [the minority group] is sufficiently large and geographically compact to constitute a majority in a single-member district"; second, "that it is politically cohesive"; and third, "that the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate."

Growe v. Emison, 507 U.S. 25, 40, 122 L. Ed. 2d 388, 113 S. Ct. 1075 (1993) (quoting *Gingles*, 478 U.S. at 50-51). The district court stated that if plaintiffs succeed in showing that the *Gingles* three-part threshold is reached, plaintiffs must also show that under the "totality of the circumstances" Hispanics do not possess the same opportunities to participate in the political process enjoyed by other voters, considering factors set forth in *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973) (en banc), aff'd sub nom. *East Carroll Parish Sch. Bd. v. Marshall*, 424 U.S. 636, 47 L. Ed. 2d 296, 96 S. Ct. 1083 (1976), and the Senate Report of the Voting Rights Act Amendments of 1982.[4]

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[4] The *Zimmer* factors are as follows: (1) the extent of any history of official discrimination in the PISD that touched Hispanics' right to register, to vote, or otherwise participate in the democratic process; (2) the extent to which voting in the PISD is racially polarized; (3) the extent to which the PISD has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices that may enhance the opportunity for discrimination; (4) whether Hispanics have been denied access to a candidate slating process; (5) the extent to which Hispanics in the PISD bear the effects of discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process; (6) whether

The district court found that plaintiffs failed to establish the first element of the three-part *Gingles* test because they did not show that it is possible to draw one or more districts in the PISD with a majority Hispanic citizen voting-age population. The district court considered several proposed plans which would have seven single-member districts with at least one district containing a Hispanic voting-age population exceeding fifty percent. The district court found, and plaintiffs do not contest, that approximately sixty percent of the Hispanic population in the PISD are citizens, and therefore a proposed district must have a Hispanic voting-age population exceeding 62.5 percent for the Hispanic citizen voting-age population to exceed fifty percent.[5]

The district court rejected plaintiffs' argument that they only need establish that it is possible to create a single-member district in which the majority of the voting-age

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political campaigns have been characterized by overt or subtle racial appeals; and (7) the extent to which Hispanics have been elected to public office in the PISD. See S. Rep. No. 97-417, at 28-29 (1982), reprinted in 1982 U.S.C.C.A.N. 177, 206-07 (citing *Zimmer*, 485 F.2d at 1305). Two additional factors that may have probative value in determining whether there is a violation of the Voting Rights Act are (1) whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of Hispanics, and (2) whether the policy underlying the PISD's use of such a voting practice is tenuous. See id. at 29; see also *Brewer v. Ham*, 876 F.2d 448, 451 n.4 (5th Cir. 1989).

[5] The proposed district with the largest Hispanic voting-age population using 1990 census data had a 58.8 percent Hispanic population and a 52.9 percent Hispanic voting-age population.

population, not the majority of the citizen voting-age population, is Hispanic. Plaintiffs alternatively urged the district court to accept their projections that at least two proposed districts would reach a Hispanic citizen voting-age population exceeding fifty percent as early as 1995. The district court rejected plaintiffs' projections as unreliable and used 1990 census data in its analysis.[6]

Although the district court found that plaintiffs failed to meet the first *Gingles* requirement, the court exhaustively considered the evidence presented, addressed the remaining two *Gingles* requirements, and considered the "totality of circumstances" using the Zimmer factors. The district court found that Hispanics in the PISD voted cohesively and therefore that plaintiffs had met the second *Gingles* requirement. The district court also found that Anglo voters generally had not voted for Hispanic candidates in PISD elections, but did not decide if this was the result of racial polarization meeting the third *Gingles* requirement. Finally, the district court evaluated the totality of the circumstances and found that plaintiffs had raised valid concerns that Hispanic citizens' participation in the Board elections was limited by voting barriers including a small number of polling

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[6] Plaintiffs simply annualized the eighty percent growth rate of the Hispanic population in the PISD between 1980 and 1990 and applied that rate to the 1990 population data. Plaintiffs do not appeal the district court's rejection of this method of population projection, but argue instead that the district court should have taken a "more flexible approach" to the first *Gingles* factor by considering the total Hispanic population in the PISD, high Hispanic voter-turnout in Pasadena in 1995, and other "non-census" data.

places. the absence of minority election officials, and the operation of a slating committee. Nonetheless, the court determined that because plaintiffs had not met the "necessary precondition" of proving that it is possible to create a single-member district in which the majority of voting-age citizens is Hispanic, it "must find in favor of the defendants." *Perez v. Pasadena Indep. Sch. Dist.*, 958 F. Supp. 1196, 1230 (S.D. Tex. 1997). Plaintiffs appeal.

II. DISCUSSION

Plaintiffs argue that the district court erred as a matter of law in entering judgment in favor of defendants because it created a "bright-line" rule that plaintiffs must demonstrate that a majority of the citizen voting-age population in a proposed single-member district is Hispanic. Plaintiffs further contend that the district court erred in finding that the majority of the citizen voting-age population in the proposed districts is not Hispanic because plaintiffs demonstrated that the districts contain a growing Hispanic population and have a demographic composition similar to that of districts that have elected Hispanic candidates. Finally, plaintiffs argue that the district court erroneously taxed them for defendants' costs.

A. Standard of Review

We review de novo the legal standards a court applies to determine whether Section 2 has been violated. See *Gingles*, 478 U.S. at 79. We review the district court's findings on the Gingles threshold requirements and its ultimate findings of vote dilution, however, for clear error. *See id.*; *League of United Latin Am. Citizens # 4552 (LULAC)*

v. Roscoe Indep. Sch. Dist., 123 F.3d 843, 847 (5th Cir. 1997); *Overton v. City of Austin*, 871 F.2d 529, 532-33 (5th Cir. 1989) ("Reliance upon . . . the Court's voter dilution threshold analysis . . . [is] a fact-bound, intensely local inquiry highly dependent upon the district court's conclusions. As such, the clearly erroneous test applies to the district court's findings."). The application of the clearly-erroneous standard to findings on the *Gingles* threshold requirements thus "preserves the benefit of the trial court's particular familiarity with the indigenous political reality without endangering the rule of law." *Gingles*, 478 U.S. at 79.

B. Citizenship in the First *Gingles* Requirement

The Supreme Court has determined that the "right" question in vote dilution claims under Section 2 is whether "as a result of the challenged practice or structure plaintiffs do not have an equal opportunity to participate in the political processes and to elect candidates of their choice." *Gingles*, 478 U.S. at 44 (quoting S. Rep. No. 97-417, at 28 (1982)). As a matter of law, the use of at-large voting can impede the ability of minority voters to elect representatives of their choice only if the plaintiffs demonstrate that the group meets the three *Gingles* requirements. See *Growe*, 507 U.S. at 40; *Gingles*, 478 U.S. at 50-51; *Campos v. City of Houston*, 113 F.3d 544, 547 (5th Cir. 1997) ("Failure to establish any one of these threshold requirements is fatal.").

The first *Gingles* threshold requires that plaintiffs demonstrate that Hispanics in the PISD are "sufficiently large and geographically compact to constitute a majority in a single-member district." *Gingles*, 478 U.S. at 50. Plaintiffs argue that they have met this requirement because they

proposed districts containing an Hispanic voting-age population exceeding fifty percent. We have unequivocally held, however, that courts "must consider the citizen voting-age population of the group challenging the electoral practice when determining whether the minority group is sufficiently large and geographically compact to constitute a majority." *Campos*, 113 F.3d at 548 (emphasis added). As we reasoned in *Campos*, such a result is required by the plain language of Section 2. *See id.*; *see also Barnett v. City of Chicago*, 141 F.3d 699, 704 (7th Cir.) ("We think that citizen voting-age population is the basis for determining equality of voting power that best comports with the policy of [Section 2]."), *cert. denied, 118 S. Ct. 2372 (1998)*. The district court therefore correctly required that plaintiffs demonstrate that Hispanics would represent a majority of voting-age citizens in a proposed district.

C. Relevant Evidence in the First *Gingles* Requirement

Plaintiffs argue that courts should be "more flexible" in evaluating the first *Gingles* requirement and that it is possible to show that minorities have the ability to elect candidates of their choice even if they comprise less than a majority of voting age citizens in a given district. In making this argument, plaintiffs rely on our decision in *Westwego Citizens for Better Government v. City of Westwego,* 906 F.2d 1042, 1046 (5th Cir. 1990) (per curiam), in which we recognized that "minority voting-age population data, minority voter registration data and evidence of success by minority preferred candidates is relevant to the first *Gingles* factor." Plaintiffs assert that the district court erred in finding that Hispanics would not have the ability to elect a preferred candidate in the proposed districts because Hispanics

represent a growing percentage of the total population and Hispanic candidates have succeeded in similar districts.

As we held in *Westwego*, however, evidence relating to elections in similar districts and the total population in a proposed district is relevant only in determining whether a majority of the voting-age population in the proposed district is Hispanic. *See id.* at 1045-47. "The appropriate method of establishing the first *Gingles* factor is a 'matter of fact' which the plaintiff must prove, but there is no 'uniform method.'" *Id.* at 1046-47 (quoting *Brewer*, 876 F.2d at 452). While such evidence may inform the analysis as to whether a minority group comprises a majority of the voting-age citizens in a proposed district and therefore reaches the threshold requirement, evidence that the group may succeed in electing preferred candidates cannot remedy its failure to meet the *Gingles* threshold.

The district court considered plaintiffs' evidence regarding elections in similar districts and the projected growth of the Hispanic population, but the court found plaintiffs' projections unreliable. Furthermore, the court noted that the percentage of Hispanics voting in the PISD and in elections in similar districts has remained essentially unchanged since 1990 and that the rate of growth in Hispanic voter registration has increased at a slower rate than plaintiffs' Hispanic citizen growth projections. Faced with what it described as a "Hobson's choice between two unsatisfactory alternatives," the district court properly weighed the evidence and adopted the 1990 census data as the most reliable, and we find no clear error in its decision. *Perez*, 958 F. Supp. at 1212-13. We therefore affirm the district court's entry of judgment for defendants on the Section 2 claim.

D. Costs

Following the entry of judgment in its favor, defendants filed a bill of costs with the district court on March 25, 1997. Defendants requested $ 162,745.17 in costs, including fees for court reporting, witnesses, expert witnesses, mediation, copies, and other related expenses under *28 U.S.C. § 1920* (1994).[7] The district court entered an order on May 8, 1997 awarding $ 13,925.43 as costs for court reporting fees for depositions and for the cost of copying defendants' trial notebook, and plaintiffs timely appeal.

Plaintiffs argue that the district court erred in awarding defendants expenses for duplicating their trial notebook because defendants failed to provide receipts or obtain authorization from the district court for its exhibits. *See Zapata Gulf Marine Corp. v. Puerto Rico Maritime Shipping*

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[7] *28 U.S.C. § 1920* provides in relevant part:

A judge or clerk of any court of the United States may tax as costs the following:

. . .

(2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;

. . .

(4) Fees for exemplification and copies of papers necessarily obtained for use in the case.

Id. Under Federal Rule of Civil Procedure 54(d)(1), "except when express provision therefor is made either in a statute of the United States or in these rules, costs other than attorneys' fees shall be allowed as of course to the prevailing party unless the court otherwise directs."

Auth., 133 F.R.D. 481, 484 (E.D. La. 1990) (disallowing "essentially undocumented" claim for copies of papers). Plaintiffs also argue that the district court erred in awarding deposition costs because the depositions included questions on an issue that plaintiffs did not challenge and the depositions were not significantly used at trial. Finally, plaintiffs assert that the award of costs will discourage future civil rights lawsuits.[8]

We review the district court's award of costs to a prevailing party for abuse of discretion. *See LULAC*, 123 F.3d at 848-49; *Allen v. United States Steel Corp.*, 665 F.2d 689, 697 (5th Cir. Unit B 1982) ("The district court has great latitude in determining whether an award of deposition costs is warranted."). Factual findings made by the district court are reviewed for clear error. *See Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245, 256 (5th Cir. 1997), *cert. denied*, 139 L. Ed. 2d 636, 118 S. Ct. 690 (1998).

We have reviewed the record and we find no abuse of discretion in the district court's award of costs. The district court found that defendants listed the trial exhibits in the pretrial order and provided the court a copy of their trial notebooks. *See Louisiana Power & Light Co. v. Kellstrom*, 50 F.3d 319, 335 (5th Cir. 1995) (requiring pretrial approval of exhibits for costs to be taxed). Furthermore, plaintiffs neither

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[8] Plaintiffs also argue that the depositions were redundant and that the award was inequitable because plaintiffs lost on only one issue and the public has benefitted from subsequent changes in PISD elections. Plaintiffs did not raise these arguments before the district court, however, and we will not consider them in this appeal.

challenge the necessity of the copies nor provide any support for their assertion that the district court abused its discretion by failing to require that defendants produce receipts. *See Duke v. Uniroyal, Inc.*, 743 F. Supp. 1218, 1227 (E.D.N.C. 1990) ("It is not necessary or desirable for federal courts to review receipts for every five dollar expenditure. Judges, being former practicing attorneys, are quite capable of determining the reasonableness of expenses incurred during litigation."), *aff'd in relevant part*, 928 F.2d 1413 (4th Cir. 1991); *cf. Zapata*, 133 F.R.D. at 484 (finding Zapata's claim "essentially undocumented" because Zapata provided no information about what was copied, how the copies were used, or whether the copies were necessary).

Similarly, we are unconvinced by plaintiffs' argument that the depositions were investigatory and infrequently used at trial and that therefore the award of costs was an abuse of discretion. *See Allen*, 665 F.2d at 697 (finding no abuse of discretion where deposition fees were awarded for depositions that were not used at trial). Although plaintiffs highlight several places in the trial record where they state that they did not challenge whether the PISD is responsive to the Hispanic population, there is no indication, nor do they argue, that they conceded the issue prior to the subject depositions. Finally, we find no support for plaintiffs' assertion that the award of costs is an abuse of discretion because it may inhibit future civil rights lawsuits. *See LULAC*, 123 F.3d at 848-49 (affirming award of costs against plaintiff in Section 2 case); *cf. Cypress-Fairbanks*, 118 F.3d at 256-57 (finding no abuse of discretion in awarding school district costs in Individuals with Disabilities Education Act suit, although such an award may have a "chilling effect" on future plaintiffs). We therefore affirm the district court's order granting defendants

$ 13,925.43 in costs.

III. CONCLUSION

For the foregoing reasons, we AFFIRM the judgment and cost order of the district court.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT TEXAS
HOUSTON DIVISION

[Filed March 13, 1997]

No. H-92-3578

ROSALINDA PEREZ, et al.,	)
Plaintiffs,	)
	)
v.	)
	)
PASADENA INDEPENDENT SCHOOL DISTRICT, et al.,	)
Defendants.	)

MEMORANDUM AND OPINION

ROSENTHAL, District Judge.

In this voting rights case, plaintiffs challenge the at-large voting system for electing members of the school board for the Pasadena Independent School District (the "PISD"). Plaintiffs contend that the current system dilutes the votes of politically cohesive Hispanics in the PISD, in violation of section 2 of the Voting Rights Act, 42 U.S.C. § 1973, *et seq.*, and the Fourteenth and Fifteenth Amendments to the United

States Constitution.

The parties presented evidence to the court from May 31, 1995 through June 8, 1995. Because significant legal developments occurred after that date, this court reopened the record on February 10, 1997 to hear arguments and evidence on elections and relevant demographic changes which had taken place since June 1995.

"Because the resolution of a voting dilution claim requires close analysis of unusually complex factual patterns, and because the decision of such a case has the potential for serious interference with state functions, . . . district courts [must] explain with particularity their reasoning and the subsidiary factual conclusions underlying their reasoning." *Westwego Citizens for Better Gov't v. City of Westwego*, 872 F.2d 1201, 1203 (5th Cir. 1989); *quoting Velasquez v. City of Abilene*, 725 F.2d 1017, 1029 (5th Cir. 1984).[1] In accordance with the requirements of Fed. R. Civ. P. 52(a) and the Fifth Circuit precedents, this court examines the applicable law and sets out its Findings of Fact and Conclusions of Law.

THE LEGAL FRAMEWORK

The fundamental question in this section 2 vote

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[1] The Fifth Circuit has emphasized that there is a "special need for detailed findings of fact in vote dilution cases." *Westwego Citizens for Better Gov't v. Westwego*, 872 F.2d 1201, 1203 (5th Cir. 1989); *see also Overton v. City of Austin*, 871 F.2d 529, 530-31 (5th Cir. 1989) (the district court must perform a "searching and practical evaluation of 'past and present reality'").

dilution case is whether, as a result of the at-large system for the PISD school board elections, Hispanics in the PISD school board elections, Hispanics in the PISD "do not have an equal opportunity to participate in the political processes and to elect candidates of their choice." *Thornburg v. Gingles*, 478 U.S. 30, 44-45, 106 S.Ct. 2752, 2763, 92 L.Ed.2d 25 (1986).

Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, as amended, provides that:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color . . .
> (b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens . . . in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *provided*, that nothing in this section establishes a right to have members of a protected class elected in

> numbers equal to their proportion of the population.

42 U.S.C. § 1973 (emphasis in original).

Section 2 claims brought against at-large voting, or "multimember" election schemes, are governed by *Thornburg v. Gingles*, 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986). In *Gingles*, the Supreme Court held that the use of at-large voting would not impede "the ability of minority voters to elect representatives of their choice" unless there is a white bloc voting majority that would "*usually* be able to defeat candidates supported by a politically cohesive, geographically insular minority group." 478 U.S. at 47-48, 106 S.Ct. at 2765 (emphasis added). The plaintiffs must meet the *Gingles* three-part threshold test:

> [*f*]*irst* that the group is sufficiently large and geographically compact to constitute a majority in a single member district; *second*, tat it is politically cohesive and *third*, that the white majority votes sufficiently as a bloc to enable it usually to defeat the minority's preferred candidate.

Growe v. Emison, 507 U.S. 25, 39-41, 113 S.Ct. 1075, 1084, 122 L.Ed.2d 388 (1993) (emphasis added); *see also Gingles*, 478 U.S. at 49-53, 106 S.Ct. at 2766-67; *Clark v. Calhoun County, Miss.*, 88 F.3d 1393, 1395 (5th Cir. 1996).

If the *Gingles* three-part threshold is met, plaintiffs must then also show that under the "totality of the circumstances," plaintiffs do not possess the same

opportunities to participate in the political process and elect representatives of their choice enjoyed by other voters. *Rollins v. Fort Bend Independent School District*, 89 F.3d 1205 (5th Cir. 1996); *Clark*, 88 F.3d at 1396 ("it will be only the very unusual case in which the plaintiffs can establish the existence of the three *Gingles* factors but still have failed to establish a violation of § 2 under the totality of the circumstances"); *LULAC v. Clements*, 999 F.2d 831, 849 (5th Cir. 1993) (en banc), *cert. denied* 510 U.S. 1071, 114 S.Ct. 878, 127 L.Ed.2d 74 (1994). To make this determination, a court must conduct a "searching practical evaluation" of the factors set forth in *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973) (en banc), *aff'd sub. nom., East Carroll Parish School Board v. Marshall*, 424 U.S. 636, 96 S.Ct. 1083, 47 L.Ed.2d 296 (1976), and in the Senate Report of the 1982 Amendments to the Act.

The *Zimmer* factors are:

1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;

2. the extent to which voting in the elections of the state or political subdivision is racially polarized;

3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination

against the minority group;

4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;

5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;

6. whether political campaigns have been characterized by overt or subtle racial appeals; and

7. the extent to which members of the minority group have been elected to public office in the jurisdiction.

S. REP. NO. 417, 97th Cong., 2d Sess., *reprinted in* 1982 U.S.C.C.A.N. 177 at 206-07; *see also Brewer v. Ham*, 876 F.2d 448, 451 n. 4 (5th Cir. 1989); *Westwego*, 872 F.2d at 1204-05.

Zimmer and the Senate Report recognize two additional factors that may have probative value in determining whether there is a violation of the Voting Rights Act:

(1) whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group; and

> (2) whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice, or procedure is tenuous.

Brewer, 876 F.2d at 451 n.4; *Westwego*, 872 F.2d at 1204-05.

The plaintiffs must show that "under the totality of circumstances, they do not possess the same opportunities to participate in the political process and elect representatives of their choice enjoyed by other voters." *Clark*, 88 F.3d at 1395; *Westwego*, 872 F.2d at 1206. The "totality" test requires a careful evaluation of the *Gingles* as well as the *Zimmer* factors. *Monroe v. City of Woodville, Miss.*, 881 F.2d 1327, 1334 (5th Cir. 1089), *cert. denied*, 498 U.S. 822, 111 S.Ct. 71, 112 L.Ed.2d 45 (1990). In this evaluation, a court must recognize two themes that have been emphasized in similar cases: (1) courts may not tolerate political systems that effectively exclude minority voters from the democratic process; and (2) courts have rejected the notion that the Act secures to any group of citizens the right to obtain political representation in proportion to its numbers. *Williams v. City of Dallas*, 734 F.Supp. 1317, 1320 (N.D.Tex. 1990).

The Fifth Circuit has made it clear that requiring race-based remedies under section 2 of the Voting Rights Act is consistent with the Supreme Court's decisions in *Miller v. Johnson*, – U.S. –, 115 S.Ct. 2475, 132 L.Ed.2d 762 (1995), *Shaw v. Hunt*, — U.S. —, 116 S.Ct. 1894, 135 L.Ed.2d 207 (1996), and *Bush v. Vera*, — U.S. —, 116 S.Ct. 1941, 135 L.Ed.2d 248 (1996). *Clark*, 88 F.3d at 1402-08. In *Clark*, the Fifth Circuit stated that the three Supreme Court decisions

"establish a number of important, propositions. First, race-based redistricting, even that done for remedial purposes, is subject to strict scrutiny. Second, compliance with section 2 of the Voting Rights Act is a compelling governmental interest. Third, the State must have a strong basis for concluding that the three *Gingles* preconditions exist in order to claim that its redistricting plan is reasonably necessary to comply with section 2. Fourth, a tailored response to a found violation must use race at the expense of traditional political concerns no more than is reasonably necessary to remedy the wrong." *Id.* at 1405-06.

Section 2 of the Voting Rights Act is consistent with the Equal Protection Clause of the Fourteenth Amendment even though, by definition, the statute uses race as a basis for remedial districts. *Id.* at 1408. "Redistricting to remedy found violations of section 2 of the voting Rights Act by definition employs race. *Miller, Shaw*, and *Bush*, . . . do not foreclose the ability of States to remedy the reality of racial inequality in our political system. . . . The limit is that the remedy must use race at the expense of traditional political concerns no more than is reasonably necessary to remedy the found wrong." *Id.* at 1408 (internal quotations omitted). In order to establish a cause of action under the Fourteenth and Fifteenth Amendments, plaintiffs must establish that the defendants acted with a discriminatory design or purpose. *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 264-66, 97 S.Ct. 555, 563, 50 L.Ed.2d 450 (1977); *Washington v. Davis*, 426 U.S. 229, 238-42, 96 S.Ct. 2040, 2047-48, 48 L.Ed.2d 597 (1976).

FINDINGS OF FACT

I. The Parties

The individual plaintiffs — Rosalinda Perez, Dolores E. Garcia, Maggie Ramirez, Zina Gonzales, Maria Gonzales, Celestino M. Perez, Jr., Jenky M. Diaz, David R. Segura, Rudy N. Trevino, and Yvonne Ruth — are Hispanic/Mexican-American citizens of the United States who are residents of the PISD. Plaintiff Celestino Perez unsuccessfully ran for election to the Pasadena City Council, District G in 1993, Position No. 4 on the PISD Board of Trustees in 1994, and the Board of the San Jacinto Junior College District in 1995. Plaintiff, Pasadena Citizens for Equitable Representation, is an informal association comprised of the individual plaintiffs. The association lacks officers, by-laws, membership criteria, and formal organization.

The PISD is a political subdivision of the State of Texas, organized in 1889. The PISD covers approximately eighty-five square miles, located in the southwest part of Harris County, Texas, immediately southeast of Houston, Harris County, Texas. The PISD encompasses portions of the incorporated cities of Pasadena, South Houston, Houston, and unincorporated areas of Harris County, Texas. During the 1991-1992 school year, the PISD had approximately 38,671 students attending 51 schools and had approximately 4,000 employees.

From 1981 to 1994, the PISD experienced growth at an annual rate of approximately five to six percent in its average daily attendance population. According to the Texas Education Agency 1991-1992 fall survey, of the

approximately 38,671 students enrolled in PISD, forty-nine percent (49%) were White/Caucasian, forty-two percent (42%) were Hispanic/Mexican-American, five percent (5%) were African-American, and four percent (4%) were "other" non-white.

The Pasadena School Board of Trustees (the "Board") is responsible for the management and governance of the PISD under Tex. Educ. Code Ann. §§ 23.02-23.999 (Vernon 1987 & Supp. 1996). The PISD Board of Trustees is comprised of seven members, each elected at-large by voters living in the PISD. In 1992, the individual defendants — Carmen, Orozco, Denny Delafield, Vickie Morgan, Bob Blair, Marshall Kendricks, Harvey Turner, and John Elam — were the elected members of the Board of Trustees of the PISD. Defendant Carmen Orozco, as Hispanic/Mexican-American, first won election to the PISD Board of Trustees in 1987. Orozco was reelected in 1990, 1993, and 1996. Orozco ran unopposed in 1996.

II. The Background of this Lawsuit

Members of the PISD Board of Trustees are elected through an at-large system. Each of the seven PISD Trustees is elected for a staggered three-year term. Two or three positions are filled by district-wide elections each year. Each Trustee is elected by a plurality of the votes cast on a district-wide basis. Candidates run for a specific position on the Board. Each qualified voter in the PISD is entitled to vote for one candidate for each position up for election in any given year. The elections for the Board of Trustees of the PISD are non-partisan.

In 1996, the PISD Board voluntarily studied converting from the at-large system to a single-member district system of electing Trustees. The PISD Board appointed a committee to study the potential conversion and took comments from the public. One group that provided comments, the Hispanic Advisory Committee, consisted of approximately twenty to thirty members of the Hispanic community and was represented by Isaiah Torres. The PISD Board held public hearings and community meetings regarding the adoption of a single-member district election system. The Board retained a demographer, Bobby Bowers, who drew district election lines for proposed single-member districts. The PISD Board adopted a "5-2 plan" using Bowers' district lines and submitted the plan to the United States Department of Justice for preclearance, to use by January 1987. The plan did not receive support from the Hispanic community or from the community at large.[2] The Hispanic Advisory Committee opposed the plan on the grounds that the plan divided the Hispanic community and did not take into account the Hispanic growth rate. The Department of Justice declined to preclear the 1986 proposed 5-2 plan. The PISD Board withdrew the proposed plan and rescinded its order adopting the 5-2 plan.

On November 19, 1992, plaintiffs filed this suit, claiming that Hispanics do not have an equal opportunity to participate in the political process and to elect to the PISD Board candidates of their choice, because of the at-large election system; the use of staggered terms and the numbered post system which eliminate single-shot voting; the large

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[2] Pls. Ex. 17.

population of the district; the comparatively small number of polling places; the absence of minorities as election officials; and the economic differences between the Anglo and minority communities. Plaintiffs ask this court to require the PISD to change the method of electing Trustees from the at-large system to a single-member district system.

The PISD Board of Trustees voted unanimously to defend this lawsuit.

III. The Fact and Expert Witnesses

Plaintiffs offered the testimony of Dr. Henry Flores as an expert in statistical analysis. Dr. Flores holds B.A., M.A., and Ph.D. degrees in political science, and is the chair of the Department of Political Science at St. Mary's University in San Antonio, Texas. Plaintiffs also offered the testimony of George Korbel as an expert witness on the *Gingles* threshold, as well as on the *Zimmer* factors. Korbel holds a B.A. degree in government and philosophy and a J.D. degree from the University of Minnesota. Since 1981, Korbel has worked as a litigation coordinator for Texas Rural Legal Aid, Inc. Korbel is a recognized voting rights expert, whose focus is on the non-statistical analysis of elections and the factors that influence their outcome. Plaintiffs also offered the testimony of John E. Castillo ("Castillo"), who has experience as a political consultant, is familiar with the demographics of South Houston and Pasadena, and has worked on redistricting plans for municipal elections in Houston. Mr. Castillo provided estimates as to the numbers of Hispanics of voting age living in the PISD.

At the February 10, 1997 hearing, plaintiffs offered

the testimony of Dr. Tatcho Mindiola, Jr. as an expert on the first *Gingles* threshold. Dr. Mindiola updated the demographic projections offered by Mr. Korbel in the 1995 trial, using Mr. Korbel's methodology. Dr. Mindiola holds a Bachelor of Business Administration and M.A. and Ph.D. degrees in sociology. Dr. Mindiola is an associate professor of sociology at the University of Houston and director of the University of Houston Center for Mexican American Studies.

Defendants offered the testimony of Dr. John Alford as an expert in statistical analysis, to explain the significance of the voting patterns and to examine population growth trends. Dr. Alford holds B.S., M.A., and Ph.D. degrees in political science and an M.P.A. in public administration. He is an associate professor at Rice University.

The court finds that Drs. Flores, Mindiola, and Alford are experts in the field of statistical analysis; that Drs. Flores and Alford are experts in applying statistical analysis to issues raised by election districts; and that Mr. Korbel is an expert in the field of non-statistical voting rights analysis. Mr. Castillo is a fact witness regarding elections in the South Houston and Pasadena areas.

IV. The First *Gingles* Factor

The threshold question is whether it is possible to draw one or more majority-minority districts in the PISD. Drawing majority-minority districts requires a minority

population that is of sufficient size and compactness[3] to allow the construction of a compact and contiguous district in which the minority group can form an effective voting majority.

A. The 1990 Census: Distribution of Hispanic Voting-Age Population in the PISD

According to the 1990 United States Census of Population, the PISD had 187,047 residents, of whom 62.07 percent are Anglo (116,104); 30.22 percent are Hispanic (56,529); 3.94 percent are African-American (7,371); and 3.74-.77 percent are "other" (7,003). The voting-age population of the PISD according to the 1990 census is 131,405, of whom 66.84 percent are Anglo (87,824); 26.06 percent are Hispanic (34,247); 3.56 percent are African-American (4,671); and 3.56 percent are "other" (4,675).

The 1990 census population and voting-age population ("VAP") figures and percentages are reflected in the following table: [4] (Exhibit 1) [Publisher's Note: All exhibits immediately following this motion.]

There are only four polling places in the PISD for Board elections. The polling places are located at Pasadena High School, Sam Rayburn High School, South Houston High

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[3] *Cf. Houston v. Lafayette County*, 56 F.3d 606, 611 (5th Cir. 1995) (a court should "focus[ ] on the size and concentration of the minority population, rather than only on the shape of the districts in the plaintiff residents' specific proposals").

[4] *See* charts I and II in the appendix to this memorandum and opinion. (These are not included in this petition's appendix.)

attendance zones for each of the four schools serve as the boundary lines for each polling place. The population and voting date for the 1986 through 1997 elections is grouped by the four polling places.

For the 1987-1994 elections, the areas served by the four polling places show the following distribution of Hispanic voting-age population:

POLLING PLACE	HISPANIC PERCENTAGE OF VAP IN EACH POLLING PLACE
Pasadena High School	35.33%
South Houston High School	30.97%
Rayburn High School	20.80%
Dobie High School	15.36%

B. The Proposed Single-Member District Plans

In this lawsuit, plaintiffs argue that it is possible to develop a plan for seven single-member districts using 1990 census data (the "Korbel Plan"). Under this plan, in proposed District 1, 55.07 percent of the voting-age population would be Hispanic and in proposed District 6, 50.04 percent of the voting-age population would be Hispanic.[5] The Korbel Plan does not take into account the citizenship of the voting-age Hispanics; projected population growth trends in the Hispanic community; or a possible undercount of Hispanics in the 1990 census. The Korbel Plan was not intended as a specific

[5] Pls. Ex. 1A.

. "remedy district," but was offered to show the feasibility of developing a single-member district plan meeting the first *Gingles* requirement. Plaintiffs also presented a proposed plan for five single-member districts and two at-large districts (the "5-2 Plan D"). The 5-2 Plan D did not take into account the citizenship of the voting-age Hispanics; projected population growth trends in the Hispanic community; or a possible undercount of Hispanics in the 1990 census. The 5-2 Plan D contained one district (District 1), consisting of 51.9 percent total Hispanic population and 46.0 percent Hispanic voting-age population, and another district (District 2), consisting of 47.0 percent total Hispanic population and 41.9 percent Hispanic voting-age population. [6] Districts 1 and 2 of the 5-2 Plan are similar in location and configuration to the two proposed Hispanic-majority districts in the Korbel Plan. No projections of the populations of the districts in the 5-2 Plan D were presented.

In 1994, a PISD-retained demographer, Leslie Johnston ("Johnston"), developed a plan for seven single-member districts (the "Johnston Plan"), also using 1990 census data. The Johnston Plan contained one district, (District 1), consisting of a total Hispanic population of 58.4 percent and a Hispanic voting-age population of 52.5 percent, and a second district, (District 2), made up of a total Hispanic population of 49.2 percent and a Hispanic voting-age population of 44.0 percent.[7]

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[6] Pls. Ex. 2A.

[7] Pls. Ex. 3, p. 4.

Johnston also developed two plans with seven single-member districts, each showing one district of over 50 percent Hispanic voting-age population.[8] "Plan A" included one district, (District 1), with a Hispanic population of 58.8 percent and Hispanic voting-age population of 52.9 percent and another district, (District 2), with a Hispanic population of 50.3 percent and a Hispanic voting-age population of 45.2 percent. "Plan B" contained one district, (District 1), consisting of a Hispanic population of 58.6 percent and a Hispanic voting-age population of 52.7 percent and another district, (District 2), consisting of a Hispanic population of 48.9 percent and a Hispanic voting-age population of 43.8 percent. The Johnston Plan did not take into account the citizenship of the Hispanic voting-age population in the district; population growth estimates; or a possible undercount of Hispanics in the 1990 census figures.

Between 1980 and 1990, the total Hispanic population in the PISD increased by 80.55 percent (25,131); the total African-American population increased by 90.79 percent (3,146); and the total Anglo population decreased by 16.16 percent (-22,212).[9] This represents an eight percent annualized increase in the total Hispanic population and a one to two percent annualized decrease in the Anglo population of

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[8] Pls. Ex. 24.

[9] Pls. Exs. 52, 41. the 1980 U.S. Census of Population estimated a PISD population of 177,287 residents, contrasting with the 1990 census estimate 187,047. Korbel testified that the 1980 census estimated that 17.6 percent of the PISD was Mexican American; 2.3 percent was African-American; and just under 80 percent was Anglo.

the PISD from 1980 to 1990. At each of the four high schools within PISD, the percentage of Hispanic students grew and the percentage of Anglo students dropped from 1981 to 1994.[10]

Plaintiffs presented evidence that the application of simple annualized growth rates of 8 percent for Hispanics, 9 percent for African-Americans, and negative 1 to 1.5 percent for Anglos, results in the following voting-age population ("VAP") projection estimates for the proposed single-member districts: [See Exhibit 2]

C. *Gingles* I: A Sufficiently Large and Compact Group of *Voting-Age Citizens*

Plaintiffs argue that to satisfy the first of the *Gingles* threshold requirements, they need only establish that it is possible to create one single-member district in which the majority of the voting-age population is Hispanic. Defendants contend that plaintiffs must establish that the Hispanic community in the PISD is sufficiently large and geographically compact to create a single-member district in which the majority of voting-age *citizens* would be Hispanic.

The majority of courts addressing this issue have held that a plaintiff must establish that it is possible to create a district with a majority of minority voting-age *citizens*. *McNeil v. Springfield Park District*, 851 F.2d 937, 944-45 (7th Cir. 1988), *cert. denied*, 490 U.S. 1031, 109 S.Ct. 1769, 104 L.Ed.2d 204 (1989); *Dickinson v. Indiana State Election*

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[10] Pls. Ex. 40.

Board, 933 F.2d 497, 503 (7th Cir. 1991) ("a simple majority of eligible voters in the single-member district"); *Romero v. City of Pomona*, 665 F.Supp. 853, 854 (C.D.Cal.1987), *aff'd*, 883 F.2d 1418, 1425-26 (9th Cir.1989) (stating that *Gingles* refers to effective voting majorities, rather than raw population totals, as the touchstone for determining geographical compactness); *Morris v. City of Houston*, 894 F.Supp. 1062, 1065 (S.D. Tex.1995) ("using data of voting age Hispanic citizens is the correct measure of the Hispanic population's ability to create a majority voting district") (appeal pending, No. 95-20740, oral argument heard on 9/30/96); *Milwaukee Branch of the NAACP v. Thompson*, 929 F.Supp. 1150 (E.D.Wis. 1996) ("citizenship rates can be taken into account in resolving the issue whether a plaintiff has satisfied the first *Gingles* condition[; i]ndividuals who are not citizens are not eligible voters[; t]hose ineligible to vote are not among those whose votes have been diluted within the meaning of section 2"); *Skorepa v. City of Chula Vista*, 723 F.Supp. 1384, 1388-89 (S.D.Cal.1989); *contra LULAC v. North East ISD*, 903 F.Supp. 1071, 1084 (W.D.Tex.1995).

Gingles I requires a showing of a group of voting-age citizens sufficiently large and geographically compact to constitute a majority in the single-member district. This requirement is in harmony with the language of section 2 of the Voting Rights Act. The Act forbids voting qualifications, prerequisites, standards, practices, and procedures which "are not open to participation by members of a class of *citizens* . . . in that its members have less opportunity than other members of the electorate to participate in the political process," and which result "in a denial or abridgement of the right of any *citizen* of the United States." 42 U.S.C. § 1973 (emphasis added). The Supreme Court in *Gingles* emphasized

that "[u]nless minority *voters* possess the potential to elect representatives in the absence of the challenged structure or practice, they cannot claim to have been injured by that structure or practice." *Gingles*, 478 U.S. at 51 n. 17, 106 S.Ct. at 2767 n. 17 (emphasis added); *Camps v. City of Baytown, Tex.*, 840 F.2d 1240, 1244 (5th Cir. 1988), *cert. denied*, 492 U.S. 905, 109 S.Ct. 3213, 106 L.Ed.2d 504 (1989). Because non-citizens are not eligible to vote, they "have not experienced a dilution of their vote." *McNeil*, 851 F.2d at 944-45. *Gingles* requires a showing based on individuals of voting age to assure that those individuals are voting-eligible. To require citizenship does not add to the requirements already imposed by *Gingles*.

This court concludes that plaintiffs must demonstrate that it is feasible to draw a geographically compact district in which Hispanics comprise the majority of voting-age citizens.

D. *Gingles* I: 1990 Census Figures on Hispanic Voting-Age Citizens

The census does not report the number of citizens by race or ethnicity at the block or tract level, as it does for voting-age population. Hispanic voting-age citizenship rates, however, can be estimated by using regression analysis to compare the Hispanic population with citizenship rates.

Regression is a mathematical technique used for estimating the best fitting straight line that could be drawn to describe the relationship between two variables in a scatter plot. In a two-variable regression, R is the same as a Pearon's r or correlation coefficient. R indicates the degree of linear association between the two variables examined.

The R range is 0 to 1.0, positive or negative. R^2 describes how tightly the actual data points cluster around the regression line. It is the proportion of variation in the dependent variable that is explained or accounted for by the independent variable. The R^2 ranges from 0 to 1.0, but is always positive.

The application of the regression analysis to the 1990 census reveals that approximately 60 percent of the voting-age Hispanics in the PISD are citizens.[15] An independent estimate, based on survey data gathered by a national Hispanic political organization, reported a 54 percent adult Hispanic citizenship rate for the Houston area.[16] Assuming a 60 percent citizenship rate for voting-age Hispanics in the PISD, a district must have a Hispanic voting-age population of at least 62.5 percent[17] to produce a district with a 50

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[15] Dr. Alford testified that the regression analysis conducted provides an estimate with a 95 percent confidence interval of +/- 8. Given the 95 percent confidence interval of +/- 8, it is 95 percent certain that the true citizenship rate is between 52 percent and 68 percent. Korbel testified that the information used to determine citizenship population was available only on the "block group" level. A block group is composed of several city blocks. Korbel's proposed districts are based on block data, not block group data. The citizenship figures used by Dr. Alford require projecting group level data onto smaller areas, which compromises reliability.

[16] (Docket Entry No. 133, p. 5).

[17] The lower bound estimate of 52 percent citizenship, based on the 95 percent confidence interval, yields a 66 percent required Hispanic voting-age population to achieve an eligible

percent Hispanic citizen voting-age population.

Using the 1990 census data, none of the districts in the proposed plans has a Hispanic voting-age population of at least 62.t percent, or a citizen voting-age population of at least 50 percent. The Korbel Plan District 1 has the highest 1990 Hispanic voting-age population, at 55.07 percent. The parties appear to concede that the 1990 Hispanic citizen voting-age population is not sufficient for *Gingles* I.

The Korbel Plan proposed districts are irregularly shaped, evidencing a lack of geographic compactness. Dr. Alford testified that the Korbel Plan districts were irregular in shape; there were "fingers" extending out of the Korbel Plan districts, with many intrusions only a block wide in size. Dr. Alford testified that this did not appear justified as an attempt to recognize neighborhood boundaries or existing precincts, and was instead an effort to include as many Hispanics as possible given the dispersed residential patterns in the PISD. Korbel did not refute the irregular shape of the proposed districts, but explained that they were not intended as remedy districts. Even if the proposed single-member districts are not "remedy" districts, they must demonstrate the feasibility of drawing single-member districts with similar population sizes and compact shapes. To determine compactness, one "creates hypothetical ideal districts (*i.e.*, districts that contain precisely the same number of people) and then determines, in percentage terms, the degree of deviation between each of the actual districts and the ideal one. The maximum deviation is

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majority. The upper bound estimate of 68 percent yields a 60 percent required Hispanic voting-age population.

calculated by adding the percentage points that the largest district is above the ideal, to the percentage points the smallest is below." *Garza v. County of Los Angeles*, 918 F.2d 763, 785 (9th Cir.1990) (Kozinski, J., concurring in part, dissenting in part), *cert. denied*, 498 U.S. 1028, 111 S.Ct. 681, 112 L.Ed.2d 678 (1991); *citing Brown v. Thomson*, 462 U.S. 835, 838-39, 103 S.Ct. 2690, 2694, 77 L.Ed.2d 214 (1983). In order not to violate the one man one vote principle, the maximum deviation from the smallest to the largest district should not exceed 10 percent. Dr. Alford testified that the Korbel Plan had a population deviation of approximately 32 percent.[18] Korbel did not refute this testimony.

The proposed districts are flawed by a citizenship population of less than 50 percent, a population deviation of over 10 percent, and irregular shapes.[19] Using the 1990 census data, plaintiffs fail to prove that it is feasible to create one or more districts in which a majority of voting-age citizens are Hispanic.

E. *Gingles* I and Projected Population Trends

Because plaintiffs cannot satisfy *Gingles* I using the 1990 census data, they ask this court to determine the feasibility of creating a majority-minority district using projected estimates for the 1995 through 1998 Hispanic

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[18] The other single-member district plans proposed by plaintiffs suffered from greater population deviations than the Korbel Plan.

[19] Defs. Ex. 101; Pls. Ex. 1.

voting-age and citizen voting-age population in the PISD.

A court is not confined to United States census data in deciding whether a sufficiently large and geographically compact majority-minority single-member district can be created to satisfy *Gingles* I. *Kirkpatrick v. Preisler*, 394 U.S. 526, 534-36, 89 S.Ct. 1225, 1231, 22 L.Ed.2d 519 (1969); *Garza*, 918 F.2d at 772-73;[20] *Dixon v. Hassler*, 412 F.Supp. 1036, 1040 (W.D.Tenn.), *aff'd*, 429 U.S. 934, 97 S.Ct.346, 50 L.Ed.2d 303 (1976); *see also Westwego Citizens for Better Gov't v. City of Westwego*, 906 F.2d 1042, 1045-46 n. 3 (5th Cir. 1990). However, the census figures are presumed accurate until proven otherwise. *McNeil*, 851 F.2d at 946. Proof of changed figures must be "thoroughly documented," have a high degree of accuracy, and be "clear, cogent and convincing" to override the presumptive correctness of the prior decennial census. *McNeil*, 851 F.2d at 946; *Kirkpatrick*, 394 U.S. at 534-36, 89 S.Ct. at 1231; *Dixon*,

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[20] In *Garza v. County of Los Angles*, the court allowed the use of projections "where . . . the census data is almost a decade old and therefore no longer reliable." 918 F.2d 763, 773 (9th Cir. 1990), *cert. denied*, 498 U.S. 1028, 111 S.Ct. 681, 112 L.Ed.2d 673 (1991). The court discussed *McNeil v. Springfield Park District*, 851 F.2d 937, 946 (7th Cir. 1988), *cert. denied*, 490 U.S. 1031, 109 S.Ct. 1769, 104 L.Ed.2d 204 (1989), and stated that it saw "no reason to impose this [*McNeil*] high standard in a case where intentional discrimination has been proved, and the data is merely to be used in fashioning a remedy." *Garza*, 918 F.2d at 773 n. 3. In this case, this court has not found intentional discrimination and must use the population data to determine whether the *Gingles* prerequisites are met, not only to fashion a remedy

412 F.Supp. at 1040; *Graves v. Barnes*, 446 F.Supp. 560, 568 (W.D. Tex. 1977), *aff'd*, 435 U.S. 901, 98 S.Ct. 1444, 55 L.Ed.2d 492 (1978); *see also Dickinson*, 933 F.2d at 503. Federal census data must be used unless there is more reliable data. *McNeil*, 851 F.2d at 946; *Skorepa*, 723 F.Supp. at 1390. "Estimates based on past trends are generally not sufficient to override 'hard' decennial census data." *McNeil*, 851 F.2d at 946.

1. Reliability Problems in the 1990 Census

Korbel testified that minorities were undercounted in the 1990 census by approximately ten percent in Harris County. The concern over the undercount has been reviewed by federal courts. The issue is whether the asserted undercount of Hispanic voters is supported by "concrete evidence" sufficient to override the presumption of accuracy given the census data. *Skorepa*, 723 F.Supp. at 1390; *Cuomo v. Baldrige*, 674 F.Supp. 1089, 1104-05 (S.D.N.Y.1987). IN *Wisconsin v. City of New York*, — U.S. — 116 S.Ct. 1091, 134 L.Ed.2d 167 (1996), the Supreme Court discussed at length the concern over "a net undercount of the actual American population in every decennial census," stated that the 1990 census was "successful in counting 98.4% of the population," and held that it was reasonable for the Secretary of Commerce to conclude that the "actual enumeration" mandated by the Constitution could best be achieved in the 1990 census without the post-numeration survey statistical adjustment designed to correct an undercount in the initial enumeration.

This court finds the alleged undercount to be an

insufficient basis for rejecting the 1990 census as unreliable and for requiring estimates projecting population growth in the proposed districts. Plaintiffs offered no evidence as to any specific effect of the alleged undercount on the size of the Hispanic adult citizen population, or on the non-Hispanic population, in any of the proposed or actual districts. Dr. Alford noted that both Hispanics and non-Hispanics could have been undercounted, and that noncitizen Hispanics could well constitute the majority of those not counted. Plaintiffs have not cited any case in which a court has rejected the census figures in a voting rights case based on an alleged undercount. To the contrary, several courts have rejected such a claim for lack of evidence that the undercount made the original census count insufficiently reliable. *See, e.g., Skorepa*, 723 F.Supp. at 1890; *Cuomo*, 674 F.Supp. at 1104-05.

Common sense, as well as the expert testimony, teaches that the further away in time one moves from the census, the less reliable it becomes. However, Drs. Alford and Mindiola agreed that the further away one moves from the census, population projections based on the census also become more unreliable. The parties, and their experts, agree that the 1990 census count of the Hispanic voting-age population in the relevant area is outdated. The experts agree that the population has grown. The experts disagree as to whether the estimated projections of that growth in the proposed single-member districts in PISD are more reliable than the 1990 census count.

2. Reliability Problems in the 1997-98 Projections

The plaintiffs' experts used a decennially-compounded "straight-line" estimate to make their population projections. Plaintiffs' experts calculated the total growth rate between 1980 and 1990, then annualized it and used a straight-line growth rate between 1980 and 1990. In 1990, plaintiffs changed the population base used from the 1980 population to the 1990 population, adding the 1980-1990 population growth to the new 1990 base. Between 1990 and 2000, plaintiffs again used a straight-line growth rate. Dr. Alford testified that plaintiffs' linear progression was not a single straight-line estimate between 1980 and 2000, but two straight lines connected in 1990. The 1990-2000 straight line has a steeper slope than the 1980-1990 straight line.

Dr. Alford testified that the decennially compounded straight-line estimate for population growth, which plaintiffs' experts used to calculate the projected Hispanic population in the proposed districts, is overly simplified and wholly unreliable as a measure of the 1997 Hispanic voting-age citizenship population. Other factors must also be taken into account, such as age cohorts, birth and death rates, in- and out-migration, and absolute limiting factors, such as housing availability in a particular geographic area. Dr. Mindiola agreed that linear progressions had shortcomings in terms of accuracy, but were simple, easy to calculate, and more practical than extensive surveys.

Courts have recognized that demography is complex. Courts have rejected overly simplistic, "crude" analyses that are easy and inexpensive to calculate but too inaccurate to

serve as a basis for changing the basis of conducting elections. *Dixon*, 412 F.Supp. at 1041; *see also Kirkpatrick*, 394 U.S. at 534-36, 89 S.Ct. at 1231; *see also McNeil*, 851 F.2d at 946. In *Dixon*, the court noted that other factors must be taken into account to provide reliable projections, such as population density and land area; current information on the area with respect to listed telephones and registered automobiles; and an area's housing type, housing value, income and age of people, and family structure. 412 F.Supp. at 1041.

Dr. Mindiola testified that the straight-line method used by plaintiffs results in "conservative" population projections, for voting-age populations as well as for citizen voting-age populations. Dr. Mindiola stated that the Hispanic population was growing at a faster rate than the straight-line projection reflected. However, Dr. Mindiola could not identify for this court the basis for this estimate of the Hispanic population growth rate, citing the need for extensive surveys.

Dr. Mindiola assumed a high growth rate for the entire Hispanic population in the PISD, but could not identify a growth rate for Hispanic citizens in the proposed districts. Dr. Mindiola agreed with Dr. Alford that the citizenship rate applied to his projections would be lower if the non-citizen growth rate were greater than the citizen growth rate. Dr. Alford testified that the Hispanic citizenship rate was not constant but rather decreased during the 1990s, in part due to an increase in illegal immigration.

Dr. Alford testified that simply applying the 1980-1990 growth rate to project the 1996, 1997, and 998

populations, as plaintiffs did, leads to unreliable results. Dr. Alford supported his concern with specific evidence in the record. If the plaintiffs' population growth projections were accurate, the percentage of Hispanics voting in the PISD an exogenous elections would have increased; instead, the percentage remained essentially unchanged. If the plaintiffs' projections were accurate, Democrats, consistently favored by the Hispanic voters in the PISD, would have shown an increase in votes received over time; instead, the number of votes cast for Democratic candidates by voters in the PISD was stable. Dr. Alford testified that Hispanic voter registration did increase during the 1990s, but not at the rate that would be expected if plaintiffs' Hispanic citizen growth projections were accurate.[21]

Dr. Alford testified that the increase in Hispanic voter registration is consistent with the presence of growth in the Hispanic voting-age citizen population since the 1990 census. However, the likely rate of that growth does not approach the rate plaintiffs project. Dr. Alford testified that population projections are generally highly sensitive to assumptions and prone to error, and not simply "straight line." Dr. Alford testified that the 1990 census was the best estimate of the PISD populations, despite the passage of time.

This court finds that there is no credible evidence that

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[21] The sign-in sheets for the PISD elections showed that in 1987, 7.6 percent of those voting had Spanish surnames; in 1989, the figure was 4.3 percent; in 1990, the figure was 10.7 percent; in 1993, the figure was 6.3 percent; in 1994, the figure was 7.5 percent; and in 1995, the figure was 6.0 percent. Defs. Ex. 116.

plaintiffs' straight-line projections for growth in the Hispanic citizen voting-age population in the PISD are sufficiently reliable for the purpose of the *Gingles* analysis.

3. The Least Unreliable Alternative

This court is faced with a Hobson's choice between two unsatisfactory alternatives. The midpoint on the census cycle is passed. The 1990 census is recognized as inaccurate to a certain extent. However, the only estimates of the extent to which it is unreliable, and the only estimates of the current population, are estimates that are also unreliable. The choice is between an outdated actual count and an estimated projection based in part on that count and in part on assumptions and arithmetic.

In *McNeil*, the Seventh Circuit addressed a similar situation. 851 F.2d 937. In that case, decided in July 1988, the 1980 census "indicated a minority voting age population of roughly 43%," *Id.* at 945. The plaintiffs-appellants "rel[ied] on their expert's demographic analysis [to] estimat[e] a minority population of 56% in the proposed district as of 1987." *Id.* The appellants quoted *Gaffney v. Cummings*, 412 U.S. 735, 745-47, 93 S.Ct. 2321, 2328, 37 L.Ed.2d 298 (1973), in which the Supreme Court stated in *dicta* that:

> it must be recognized that total population, even if absolutely accurate as to each district when counted, is nevertheless not a talismanic measure of the weight of a person's vote under a later-adopted reapportionment plan. The United States census is more of an event than a process. It measures population at only a

> single instant in time. District populations are constantly change, often at different rates in either direction, up or down. Substantial differentials in population growth rates are striking and well-known phenomena.

The *McNeil* court agreed with the appellants that, "[w]ith a mobile population, the demographic facts may always be a bit stale." *McNeil*, 851 F.2d at 945. However, the court found that the appellants' argument and the Gaffney dicta suggested only that "census data may not accurately reflect present population." *Id.* at 946. The argument did not "require courts to use a different talisman." *Id.* The court stated that it would depart from the census and its presumption of accuracy only if the "proof of changed figures" was "clear and convincing." *Id.* The court also stated that "in the present state of the demographic art, estimates based on past trends are generally not sufficient to override 'hard' decennial census data. . . . Populations change constantly and kinks in the data are common." *Id.* The court ultimately held that it would use the census figure of 46 percent for the minority voting age population, but added that "if the plaintiffs' view of the population trends is correct, they will have a good claim based on the 1990 census." *Id.*

This court finds Dr. Alford's testimony and criticisms of plaintiffs' population projections to be credible. Although plaintiffs' projections may have been cost-effective and simple to calculate, they are unreliable estimates that offer only "a talismanic measure" of the population. *See McNeil*, 851 F.2d at 945-46 ("in July 1988, the court relied on the 1980 census because it found that "the meager [projection] evidence before [it could not] override the presumption of census accuracy");

see also Graves, 446 F. Supp. at 568 (in October 1977, the court relied on the 1970 census rather than the plaintiffs' projections because it found "several scientific defects" in plaintiffs' method of projection); *see also Skorepa*, 723 F. Supp. at 1390 (in October 1989, the court used the 1980 census data because the projection estimates offered by plaintiffs were "not based on the kind of concrete evidence necessary to override the presumption of accuracy of the census data").

This court does not find the projected population growth estimated by plaintiffs to be sufficiently reliable to overcome the presumption of census accuracy. If the plaintiffs' estimate of the population trends is correct, like the plaintiffs-appellants in *McNeil*, the plaintiffs in this case may have a stronger argument based on the 2000 census. However, using the 1990 census, the most reliable estimate available to this court, plaintiffs fail to meet *Gingles* I.

V. The Second and Third *Gingles* Factors[22]

A. Analysis of PISD Board Elections

From 1987[23] to 1997, there have been twelve contested races for the Board of Trustees of the PISD. Three of those

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[22] Although this court finds that plaintiffs cannot make the required showing under *Gingles* I, in order to present a complete analysis, the court also examines *Gingles* II and III and the *Zimmer* factors.

[23] The first Hispanic candidate ran for a PISD Board position in 1987.

elections involved head-to-head contests. Two of those three head-to-head contests involved a minority candidate. The trust of plaintiffs' claim is that white bloc voting defeats the preferred candidate of the minority community unless there are "special circumstances" present.

A breakdown of the results of the PISD elections with Hispanic candidates between 1987 and 1997 is summarized below:[24] [See Exhibit 3]

Both sides used regression analysis to determine whether there is a pattern of voting preferences in the PISD elections. *Rollins*, 89 F.3d at 1210 (the Supreme Court and the Fifth Circuit have approved the use of statistical analysis to evaluate racially polarized voting). Drs. Flores and Alford often agreed on the results of applying the statistical techniques to the elections. They disagreed as to the legal significance of the regression analysis results they produced. The regression analyses are one factor that this court examines in determining whether the second and third prongs of the *Gingles* test are met and whether the *Zimmer* factors evidence a section 2 violation. They are, however, only one factor among the "totality of the circumstances" that this court must examine.

Regression analyses in a voting rights case compare the density of a particular population group in a specified area with the percentage of votes received by a particular candidate in that area. *See Houston v. LaFayette County,* 56 F.3d 606,

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[24] Pls. Exs. 27-39, 70-73; see also chart III in appendix to this memorandum and opinion.

609 n.1 (5th Cir. 1995); *see also Teague v. Attala County*, 92 F.3d 283, 285 (5th Cir. 1996) ("ecological regression analysis explains how voting and turnout correspond to the proportions of whites and [minorities] in each voting precinct"). In this case, the regression analysis examines to what extent the vote for a Hispanic candidate increases as the concentration of Hispanic voters in the precinct increases. The coefficients for the y-intercept and for the slope form the equation of the actual regression line. The y-intercept defines the point at which the regression line crosses the vertical axis, giving the predicted value of the votes cast for the Hispanic candidate (the dependent variable) when the percentage of the Hispanic voting-age population (the independent variable) is zero. The slope indicates the rise of the regression line, or the predicted change in the votes cast for the Hispanic candidate (the dependent variable) for a one-percentage-point change in the percentage of Hispanic voting-age population (the independent variable).[25]

Using both the y-intercept and the slope, the predicted share of the Hispanic candidate's votes can be estimated in hypothetical "extreme" cases in which the Hispanic voting-age population is 100 percent or 0 percent. *See Teague*, 92 F.3d at 285 ("extreme case analysis looks separately at the actual

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[25] Pls. Ex. 31. Because of the secret ballot system, there is no method for determining with accuracy whether the Hispanic voters in the precinct actually voted for the Hispanic candidate. Dr. Alford demonstrated that "it is entirely possible, considering only the restrictions imposed by the totals, that one hundred percent of the vote for the Hispanic candidate could have come from the non-Hispanic community." Defs. Ex. 38. The correlation offers only an indication of estimated support.

votes [minority] candidates received in the most heavily [minority] and white precincts to give a clear indication of the preference of voters for either [minority] or white candidates in the two types of districts"); *see also Rollins*, 89 F.3d at 1210 n.5. Extreme case analyses are generally based on precincts in which one race constitutes 90 to 100 percent of the population. As the percentage of the population analyzed falls below 90 percent, the analysis becomes less reliable and less useful. In this case, none of the four polling areas is one in which one race constitutes 90 to 100 percent of the population.[26] The extreme case analysis conducted for the PISD elections is based on hypothetical extreme precincts and used only as an analytical tool to estimate the support received by each PISD trustee candidate from Anglo and Hispanic voters.

The results of Dr. Flores's regression analysis for the PISD elections are summarized below:[27] [See Exhibit 4]

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[26] In the Pasadena High School area, Hispanics constitute 35.33 percent of the voting-age population; in the South Houston High School area, they constitute 30.97 percent; in the Rayburn High School area, they constitute 20.80 percent; and in the Dobie High School area, they constitute 15.36 percent of the voting-age population.

[27] Pls. Exs. 27-29, 46. Dr. Flores testified that the statistical significance level found in the exhibits presented should be taken "with a grain of salt" in examining the election results. Generally, a statistical significance of .09 for a set of statistics indicates that, "at that particular level, . . . these particular statistics could only occur by chance nine times out of a hundred. . . . If you were in an experimental setting and you had the ability to draw

Dr. Flores testified that in his opinion, an R = .4 or above indicates a "good check" of the importance of race in voting behavior.[28] Dr. Flores cited other researchers, Delbert Miller and Earl Babbies, who also consider that an R=.4 indicates a strong relationship. Dr. Alford testified that ordinarily, when .4=<R<=.6, there is a strong correlation between variables, but with smaller data sets this "rule of thumb" does not apply because any occurrence could be the result of random chance.

The experts' analyses, as well as the testimony of the fact witnesses, have been examined in detail by this court. The court's findings as to the expert and fact witnesses' testimony are set out below -- first, in connection with the analysis of the individual elections, then in connection with how this analysis shapes the *Gingles* and *Zimmer* inquiries.

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samples from a larger population, in other words, if you could replicate this over and over again, then the statistical significance would mean something. . . . But, under these circumstances, since this is a one-time occurrence and you are never going to have an opportunity to replicate these again, . . . you can't just throw the statistics away and reject them [even if the statistical significance level is low]." Dr. Flores testified that, instead of relying on statistical significance levels, the court should evaluate the results "in a historical context in Texas and Harris County." (Docket Entry Nos. 166, 167). Statistical significance levels do not appear in the court's summary table.

[28] Dr. Flores testified that a perfect R = 1.0 is unlikely in a voting study because voting behavior involves "human beings and there is all kinds of dimensions that can't quite be tapped by a statistic, and so there is always going to be a play in there." (Docket Entry No. 166, p. 10, Ins. 14-18).

1. The 1987 Election (Position 2)

The candidates for Position 2 in the 1987 election were Stokes, Blumrick, Orozco (Hispanic), and Seiler. Orozco was elected, receiving 45.10 percent (2428/5383) of the total vote; 45.93 percent (435/947) of the vote in Pasadena; 49.33 percent (442/896) of the vote in South Houston; 57.22 percent (1058/1849) of the vote in Rayburn; 21.79 percent (277/1271) of the vote in Dobie; and 51.43 percent (216/420) of the absentee vote.[29]

Dr. Flores testified that the R for Hispanics voting for Orozco in the 1987 election for Position 2 was -.0176 with a y-intercept of 43.989. The Anglo candidates received a total of 2955 votes. Stokes received 1164 votes; Blumrick received 654; and Seiler received 1137. The Anglo candidates split the white vote. Orozco won the 1987 election for Position 2 by a plurality. Looking at y-intercepts [**55] and hypothesizing about homogeneous precincts, Dr. Flores estimated that in a hypothetical 100 percent Hispanic district, Orozco would have received 39.1 percent of the vote, while in a 0 percent Hispanic precinct, Orozco would receive 43.9 percent of the vote.

Dr. Flores testified that there was virtually no correlation between the race of the voters in any of the four polling places and the votes received by Orozco. Orozco was the preferred minority candidate in 1987 (and in 1990); she was not defeated by bloc voting.

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[29] Defs. Ex. 4.

2. The 1987 Election (Position 3)

The candidates for Position 3 in the 1987 election were Elam, Valdez (Hispanic), and Garner. Elam was elected, receiving 61.29 percent (3293/5373) of the total vote; 68.96 percent (651/944) of the vote in Pasadena; 57.89 percent (510/881) of the vote in South Houston; 73.21 percent (1347/1840) of the vote in Rayburn; 35.85 percent (460/1283) of the vote in Dobie; and 76.47 percent (325/425) percent of the absentee vote.[30] Valdez received 7.18 percent of the total vote; 4.87 percent of the vote in Pasadena; 8.63 percent of the vote in South Houston; 7.12 percent of the vote in Rayburn; 9.28 percent of the vote in Dobie; and 3.29 percent of the absentee vote.

Dr. Flores testified that the R for Hispanics voting for Valdez in the 1987 election for Position 3 was .598. Dr. Flores testified that the relationship between the Hispanic signature count and the votes received by Valdez was strong. There were 406 Spanish-surname voters in the election; Valdez received 386 votes.

The y-intercept was 5.639. Dr. Flores estimated that in a hypothetical 100 percent Hispanic district, Valdez would have received 26.2 percent of the vote, while in a 0 percent Hispanic district, Valdez would have received 5.6 percent of the vote.

Dr. Flores could not determine whether Valdez was the preferred minority candidate.

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[30] Defs. Ex. 4.

3. The 1988 Election (Position 5)

The candidates for Position 5 in the 1988 election were Early, Razo (Hispanic), Robison, and Blair. Blair was elected, receiving 51.22 percent (1840/3592) of the total vote; 66.04 percent (385/583) of the vote in Pasadena; 35.94 percent (230/640) of the vote in South Houston; 71.07 percent (764/1075) of the vote in Rayburn; 19.90 percent (192/965) of the vote in Dobie; and 81.76 percent (269/329) of the absentee vote.[31] Razo received 14.53 percent of the total vote; 10.63 percent of the vote in Pasadena; 47.03 percent of the vote in South Houston; 9.95 percent of the vote in Rayburn; 4.66 percent of the vote in Dobie; and 2.13 percent of the absentee vote.

No regression analysis of this election was presented.

4. The 1989 Election (Position 6)

The candidates for Position 6 in the 1989 election were Garvey-Montanez (Hispanic surname),[32] Rudd, Kowis, and Kendrick. Kendrick was elected, receiving 88.05 percent (2077/2359) of the total vote; 90.51 percent (458/506) of the vote in Pasadena; 83.72 percent (252/301) of the vote in South Houston; 92.30 percent (827/896) of the vote in Rayburn; 69.03 (185/268) of the vote in Dobie; and 91.49

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[31] Defs. Ex. 5.

[32] Plaintiffs argued at trial that Garvey-Montanez was not Hispanic. Dr. Flores testified that he studied her as a Hispanic candidate because she had a Spanish surname. (Docket Entry No. 166, p. 68).

percent (355/388) of the absentee vote.[33] Garvey-Montanez received 8.31 percent of the total vote; 5.53 percent of the vote in Pasadena; 13.95 percent of the vote in South Houston; 4.13 percent of the vote in Rayburn; 23.51 percent of the vote in Dobie; 6.70 percent of the absentee vote. Dr. Flores noted that there were 24 Spanish-surname voters in the Pasadena High School polling place, and Garvey-Montanez received 24 votes there. Garvey-Montanez received 27 votes at the Rayburn polling place, which had 26 Spanish-surname voters.

Dr. Flores testified that the R for Hispanics voting for Garvey-Montanez in the 1989 election for Position 6 was .712 with a y-intercept of - 1.550. Dr. Flores estimated that in a hypothetical 100 percent Hispanic district, Garvey-Montanez would have received 99 percent of the vote, while in a 0 percent Hispanic district, Garvey-Montanez would have received 0 percent of the vote.

Dr. Flores testified that Garvey-Montanez was the preferred minority candidate and was defeated by white bloc voting.[34]

5. The 1990 Election (Position 2)

The candidates for Position 2 in the 1990 election were Orozco (Hispanic) and Jackson. Orozco was elected, receiving 81.19 percent (643/792) of the total vote; 78.61 percent (136/173) of the vote in Pasadena; 90.23 percent

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[33] Defs. Ex. 6.

[34] Pls. Ex. 51.

(120/133) of the vote in South Houston; 74.75 percent (222/297) of the vote in Rayburn; 85.42 percent (41/48) of the vote in Dobie; and 87.94 percent (124/141) of the absentee vote.[35]

Dr. Flores testified that the R for Hispanics voting for Orozco in the 1990 election for Position 2 was .782 with a y-intercept of 76.026. Dr. Flores estimated that in a hypothetical 100 percent Hispanic district, Orozco would have received 99 percent of the vote, while in a 0 percent Hispanic district, Orozco would have received 76 percent of the vote.

Dr. Flores testified that Orozco was the preferred minority candidate. Dr. Flores did not find white bloc voting in this election.

6. The 1993 Election (Position 1)

The candidates for Position 1 in the 1993 election were Gutierrez (Hispanic), Roberts, Graham, and Briscoe. Roberts was elected, receiving 53.41 percent (3393/6353) of the total vote; 49.53 percent (525/1060) of the vote in Pasadena; 45.39 (458/1009) percent of the vote in South Houston; 48.45 percent (987/2037) of the vote in Rayburn; 61.71 percent (793/1285) of the vote in Dobie; and 65.49 percent (630/962) of the absentee vote.[36] Gutierrez received 3.20 percent of the total vote; 3.68 percent of the vote in Pasadena; 4.16 percent

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[35] Defs. Ex. 7.

[36] Defs. Ex. 8.

of the vote in South Houston; 2.90 percent of the vote in Rayburn; 2.18 percent of the vote in Dobie; and 3.64 percent of the absentee vote. There were 442 Spanish-surname voters in the election; Gutierrez received 203 votes. Dr. Flores testified that the R for Hispanics voting for Gutierrez in the 1993 election for Position 1 was .158 with a y-intercept of 2.901.

Dr. Flores could not determine whether Gutierrez was the preferred minority candidate.

7. The 1993 Election (Position 2)

The candidates for Position 2 in the 1993 election were Orozco (Hispanic) and Maxwell. Orozco was elected, receiving 68.26 percent (4383/6421) of the total vote; 68.97 percent (738/1070) of the vote in Pasadena; 61.04 percent (622/1019) of the vote in South Houston; 68.23 percent (1400/2052) of the vote in Rayburn; 66.26 percent (862/1301) of the vote in Dobie; and 77.73 percent (761/979) of the absentee vote.[37]

Dr. Flores testified that Maxwell, the Anglo candidate, was the preferred minority candidate. Dr. Flores estimated than in a hypothetical 100 percent Hispanic district, Maxwell would have received 99 percent of the vote, while in a 0 percent Hispanic district, Maxwell would have received 28.3 percent of the vote. Dr. Flores testified that the R for Hispanics voting for Orozco in the 1993 election for Position 2 was -.727 with a y-intercept of 72.340. Dr. Flores estimated

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[37] Defs. Ex.8.

that, in a hypothetical 100 percent Hispanic district, Orozco, the Hispanic candidate, would have received 17.7 percent of the vote, while in a 0 percent Hispanic district, Orozco would have received 72.3 percent of the vote.

8. The 1993 Election (Position 3)

The candidates for Position 3 in the 1993 election were Andrew, Heil, Leatherman, Garcia (Hispanic), Nelda Sullivan, and Crawford. Nelda Sullivan was elected, receiving 63.14 percent (3984/6310) of the total vote; 65.65 percent (686/1045) of the vote in Pasadena; 53.59 percent (537/1002) of the vote in South Houston; 62.94 percent (1272/2021) of the vote in Rayburn; 61.50 percent (789/1283) of the vote in Dobie; and 72.99 percent (700/959) of the absentee vote.[38] Garcia received 1.87 percent of the total vote; 1.82 percent of the vote in Pasadena; 2.59 percent of the vote in South Houston; 1.09 percent of the vote in Rayburn; 2.26 percent of the vote in Dobie; and 2.29 percent of the absentee vote. There were 443 Spanish-surname voters in the election; Garcia received 118 votes. If all Spanish-surname voters voted for Garcia, she still received only one third of the Spanish-surname vote.

Dr. Flores testified that the R for Hispanics voting for Garcia in the 1993 election for Position 3 was .990 with a y-intercept of .405. Dr. Flores estimated that in a hypothetical 100 percent Hispanic district, Garcia would have received 63 percent of the vote while in a 0 percent Hispanic district, Garcia would have received 4 percent of the vote.

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[38] Defs. Ex. 8.

Dr. Flores could not determine whether Garcia was the preferred minority candidate.

9. The 1994 Election (Position 4)[39]

The candidates for Position 4 in the 1994 election were Ted Sullivan, Castillo (Hispanic), Filberth, Perez (Hispanic), Evans, and Jordan. Ted Sullivan was elected, receiving 58.36 percent (2105/3607) of the total vote; 54.79 percent (343/626) of the vote in Pasadena; 60.54 percent (339/560) of the vote in South Houston; 57.12 percent (658/1152) of the vote in Rayburn; 50.39 percent (327/649) of the vote in Dobie; and 70.65 percent (438/620) of the absentee vote.[40] Castillo and Perez together received 10.98 percent of the total vote; 13.74 percent of the vote in Pasadena; 11.07 percent of the vote in South Houston; 9.38 percent of the vote in Rayburn; 14.64 percent of the vote in Dobie; and 7.26 percent of the absentee vote.

Dr. Flores testified that in the 1994 election for Position 4, the R for Hispanics voting for Castillo was -.167 with a y-intercept of .082. Dr. Flores testified that the R indicated a very weak relationship. Dr. Flores estimated that in a hypothetical 100 percent Hispanic district, Castillo would have received 0 percent of the vote, and in a 0 percent Hispanic district, Castillo also would have received 0 percent

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[39] The 1994 and 1995 elections included six data points, in contrast to the four examined in the other elections. In addition to four polling places, Dr. Flores studied two absentee ballot boxes in the 1994-95 elections. (Docket Entry No. 166, pp. 30-31).

[40] Defs. Ex. 9.

of the vote.

Dr. Flores testified that the R for Hispanics voting for Perez was .955 with a y-intercept of .003. Dr. Flores testified that the correlation between Spanish-surname voters and votes received by Perez was "almost perfect," perhaps the highest he had encountered.[41] Dr. Flores estimated that in a hypothetical 100 percent Hispanic district, Perez would have received 43 percent of the vote, while in a 0 percent Hispanic district, Perez would have received 0 percent of the vote.

Dr. Flores testified that Perez, who received 149 out of 3,607 votes cast or under ten percent of the total votes cast, was the preferred minority candidate. Dr. Flores testified that whites voted as a bloc to defeat Perez.

10. The 1994 Election (Position 5)

The candidates for Position 5 in the 1994 election were Bennett, Segura (Hispanic), McClain, Briscoe, and Blair. Blair was elected, receiving 55.59 percent (1998/3594) of the total vote; 57.60 percent (360/625) of the vote in Pasadena; 56.73 percent (316/557) of the vote in South Houston; 61.69 percent (686/1112) of the vote in Rayburn; 31.28 percent (213/681) of the vote in Dobie; and 68.34 percent (423/619) of the absentee vote.[42] Segura received 5.95 percent of the total vote; 10.40 percent of the vote in Pasadena; 5.57 percent of the vote in South Houston; 4.23 percent of the vote in

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[41] (Docket Entry No. 166, p. 29, Ins. 12-17).

[42] Defs. Ex. 9.

Rayburn; 7.05 percent of the vote in Dobie; and 3.72 percent of the absentee vote.

Dr. Flores testified that the R for Hispanics voting for Segura in the 1994 election for Position 5 was -.726 with a y-intercept of 1.050. Dr. Flores testified that in a hypothetical 100 percent Hispanic district, Segura would have received 37 percent of the vote, while in a 0 percent Hispanic district, Segura would have received 0 percent of the vote.

Dr. Flores could not determine whether Segura was the preferred minority candidate.

11. The 1995 Trustee Election

Dr. Flores testified that in the 1995 PISD trustee election, the R for Hispanics voting for Hernandez was .745 with a y-intercept of 2.421, and the R for Hispanics voting for Perez was .826 with a y-intercept of 1.970. Dr. Flores characterized each of the relationships as very strong.

12. The 1996 Election (Position 2)

Orozco (the Hispanic incumbent) ran unopposed in 1996. Orozco was reelected after receiving 3,159 votes.[43] Orozco received more total votes than any other candidate running in a PISD trustee election in 1996. Dr. Flores testified that he could not conduct a regression analysis of the election because Orozco ran unopposed. Dr. Flores could not determine whether Orozco was the preferred minority

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[43] Defs. ex. 129.

candidate. Orozco had not been the preferred minority candidate in the 1993 election. Dr. Flores would not speculate as to why, in an atmosphere characterized as racially polarized, Orozco was not opposed.

13. The 1997 Election (Position 5)

The candidates for Position 5 in the 1997 election were Blair (incumbent), Phillips, and Gonzalez (Hispanic). Blair was elected, receiving 71.81 percent (1243/1731) of the total vote; 84.69 percent (166/205) of the vote in Pasadena; 75.74 percent (206/292) of the vote in South Houston; 82.67 percent (434/543) of the vote in Rayburn; and 31.28 percent (213/681) of the vote in Dobie.[44] Gonzalez received 7.45 percent (129/1731) of the total vote; 6.63 percent (13/205) of the vote in Pasadena; 10.66 percent (29/292) of the vote in South Houston; 6.10 percent (32/543) of the vote in Rayburn; and 10.67 percent (48/506) of the vote in Dobie.

Dr. Flores testified to the congruence between votes cast for Gonzalez and the number of Spanish-surname voters.[45] Dr. Flores noted that Gonzalez received 129 votes in the 1997 election; there were 110 Spanish-surname voters in PISD for that election. Gonzalez received 13 votes in the Pasadena polling place, where there were 13 Spanish-surname voters. Gonzalez received 32 votes in Rayburn, which had 35 Spanish-surname voters. Gonzalez received 29 votes in South Houston, which had 25 Spanish-surname voters. Gonzalez

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[44] Pls. Exs. 70, 73.

[45] Pls. Exs. 71, 72.

received 48 votes in Dobie, which had 35 Spanish-surname voters. Gonzalez received 7 early votes; 7 Spanish-surname voters voted early.

Dr. Flores testified that the R for Hispanics voting for Gonzalez in the 1997 election for Position 5 was .914 with a y-intercept of -.021. Dr. Flores testified that in a hypothetical 100 percent Hispanic district Gonzalez would have received 100 percent of the vote, while in a 0 percent Hispanic district, Gonzalez would have received 0 percent of the vote.

Dr. Flores testified that Gonzalez was the preferred minority candidate and that whites voted as a bloc against him. The preferred minority candidate received less than 8 percent of the total vote.

B. *Gingles* II: The Political Cohesion of the Minority Group

1. The Limitations of the Statistical Election Analysis

There is no data that allows a court to match an individual's vote to that individual's race or ethnicity. It is therefore difficult to predict which voters, Anglo or minority, within each polling place or precinct voted for particular candidates.

The small number of polling places, the low turnout typical of school board elections and typified by the PISD Board races, and the dispersed minority population in each polling place, all make regression analysis difficult in this case. As Dr. Alford testified, these factors limit the value of

regression analysis and of an extreme or homogeneous precinct analysis.[46]

This court agrees that the problems with the reliability of the statistical evidence plaintiffs presented are significant. Indeed, plaintiffs themselves identified a defeated preferred minority candidate in only five races: Razo in 1989; Maxwell in 1993 (defeated by Orozco); Perez in 1994 and 1995; and Gonzalez in 1997. In the other six contested races examined, although Hispanics ran, plaintiffs were unable to conclude that they were preferred minority voters. Other than Razo, none of the defeated preferred minority candidates obtained ten percent of the total vote; most did not obtain five percent.

However, the lack of reliable evidence in itself reflects the lack of participation by Hispanics in the PISD elections. The very low turnout among Hispanics and the lack of serious candidates preferred by minority voters are part of the problem: a lack of participation by Hispanics in the political process of the PISD Board elections. The inability to draw statistically meaningful conclusions from regression analysis cannot end the inquiry as to whether voting dilution because of racial polarization is present. "To hold otherwise would allow voting rights cases to be defeated at the outset by the very barriers to political participation that Congress has sought to remove." *See Clark*, 88 F.3d at 1398 (the fact that "few or no black citizens had sought public office in the

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[46] Absentee votes are cast in school board elections. It is normally impossible to analyze the absentee voting for racial make-up. However, because the regression analysis was based on the Spanish surname signature counts, absentee voting in this case does provide a fifth data point for use in the regression analysis.

challenged electoral system did not preclude a claim of vote dilution"); *citing Westwego*, 872 F.2d 1201, 1208 n.9.

Dr. Flores testified that conclusions on political cohesion should not be based wholly on regression analyses "because fundamentally it leaves a lot to be desired. . . . Sometimes you can't really tap a lot of information with it, sometimes you can."[47] Dr. Flores testified that other methods can be used to supplement a study of voting behavior, such as extreme case analysis, underrepresentation analysis, turn-out analysis, and rank order analysis.

2. Hispanic Political Cohesion

Dr. Flores testified that there is a strong correlation between the number of Spanish-surname voters at each polling place in PISD Board elections from 1987 to 1997 and the numbers of votes received by Hispanic candidates.[48] Dr. Flores testified that the Rs indicated a strong relationship between race and voting behavior in the PISD elections. Dr. Flores testified that the regression analysis results were consistent with the presence of racially polarized voting, although Dr. Flores would not rely entirely on the results in concluding that racially polarized voting existed in the Pasadena Independent School District.

Orozco has consistently received equivalent levels of

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[47] (Docket Entry No. 166, p. 13, Ins. 13-16).

[48] Pls. Exs. 30-35, 72-73; Docket Entry No. 166, pp. 49-55.

support from Hispanic and non-Hispanic voters. In her first election in 1987, there was no incumbent, and the Anglo vote was split among the three other candidates. In 1990, Orozco won a head-to-head contest with Jackson, and received 81.19 percent of the total vote; in 1993, Orozco defeated Maxwell in a head-to-head contest, receiving 68.26 percent of the total vote; and in 1996, Orozco was reelected after running unopposed.

The congruence between the number of votes cast for Hispanics in each polling area and the number of Spanish-surname voters in the polling area, and the regression analysis of Spanish surname signature counts against votes for Hispanic candidates, support the conclusion that Hispanics voters vote heavily in favor of Hispanic candidates. The high R value for Valdez in 1987, Garvey-Montanez in 1989, Garcia in 1993, Perez in 1994 and 1995, Hernandez in 1995, and Gonzalez in 1997, show that Hispanic voters strongly support Hispanic candidates. The analysis conducted by Dr. Flores and the testimony of Korbel show that the Hispanic community in the PISD is politically cohesive.

C. *Gingles* III: Legally Significant Bloc Voting

"The amount of white bloc voting that can generally cancel out minority voting strength will, of course, 'vary from district to district according to a number of factors.' Among the factors affecting this inquiry is the percentage of registered voters in the district who are members of the minority group." *Rangel v. Morales*, 8 F.3d 242, 245 (5th Cir. 1993); quoting *Gingles*, 106 S. Ct. at 2769 (citation omitted). "If the minority group constitutes only a small fraction of the total number of registered voters, it may be

. . . . easier for the members of that [minority] group to establish their effective submergence in a white majority." *Rangel*, 8 F.3d at 245. 14.6 percent of registered voters in the PISD are Hispanic.[49]

Dr. Flores testified that the y-intercept value in the regression analysis of Spanish surname signature counts against votes for Hispanic candidates measures the amount of non-Hispanic support for a Hispanic candidate. Dr. Flores testified that in five out of eleven contested PISD elections between 1987 and 1995, there was white bloc voting. In four of the eleven elections, Dr. Flores was not able to draw any conclusions about white bloc voting from the data. In two elections, in which Orozco ran and won, Dr. Flores found an absence of white bloc voting.[50] *See Teague*, 92 F.3d at 288 ("the Supreme Court in Gingles said that the results of a couple of elections do not discount the presence of racial bloc voting[;] . . . a showing that bloc voting is not absolute does not preclude a finding of racial polarization"). With the exception of Orozco, the y-intercept value for Hispanic candidates is never greater than 6; Hispanic candidates received very few votes from non-Spanish-surname voters. The data suggests that whites vote against the preferred minority candidates, but the data is limited. *See Teague*, 92 F.3d at 289.

In determining whether racial polarization is present in a particular election, a court should distinguish between the

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[49] Pls. Ex. 82.

[50] Pls. Ex. 51.

serious candidates and the non-serious candidates. *Campos*, 840 F.2d at 1245 n.7; see also *Teague*, 92 F.3d at 289. The distinction between serious and non-serious candidates is not based solely on the absolute numbers of votes received by a candidate. A court may take account of other factors, such as the percentage of support received from a segment of the population, or whether the candidate did the amount of work and spent a sum of money that characterize serious efforts to win an election in the district. The analysis presented to the court by plaintiffs did not attempt to distinguish "serious" candidates from non-serious candidates on any basis. *Campos*, 840 F.2d at 1245 n.7.

Defendants argue that only Orozco and Razo were serious Hispanic candidates. Orozco was elected in 1987 and reelected in 1990, 1993, and 1996. Razo was defeated by Blair in the 1988 PISD election for position 5. Orozco testified that she campaigned seriously to get elected, spending $1,200 to $1,300, holding fundraisers, posting signs in strategic places, mailing pamphlets to registered voters, attending public meetings to answer voter questions, and running telephone banks before the election. Blair, who defeated Razo, also testified that he campaigned seriously, spending $2,000, polling residents, mailing pamphlets, contacting residents by telephone, placing signs in yards and public intersections, and attending public events. Defendants argued generally that the Hispanic candidates who were defeated did little or no campaign work to get elected, spent little or no money, and could not be considered serious candidates. Plaintiffs responded that the at-large system itself and the limited number and inconvenient location of polling places in the PISD make it difficult for Hispanic candidates to mount "serious" campaigns.

Plaintiffs' statistical analysis of voting dilution and racial polarization in the PISD is weakened by the small turnout of voters generally, by Hispanic voters in particular, the small "n" on which the analysis was based, and the absence of homogeneous "extreme" Hispanic voting precincts. However, the record shows that Hispanics have voted cohesively in the PISD and that, except for Orozco, Anglo voters generally have not voted for Hispanic candidates in the PISD elections.

VI. The Zimmer Factors

A. Voting Barriers

The PISD is the sixteenth largest school district in the state. If the PISD were a city, it would be the ninth largest in Texas. The size makes it difficult for first-time candidates to run for office without using expensive forms of campaigning. Inexpensive door-to-door campaigning is difficult in the PISD because of its size. *See Clark*, 88 F.3d at 1398 (unusually large election districts "enhance the opportunity for discrimination against the minority group").

From 1970 through 1992, 3 out of 461 election officials, or 0.64 percent, were Hispanic.[51] Election officials are selected by the school board. Korbel testified that the presence of minority election officials makes it more likely that minorities will vote. *Cf. Harris v. Graddick*, 593 F. Supp. 128, 131 (M.D.Ala. 1984) ("the open and substantial presence of black poll officials, [those responsible for

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[51] Pls. Ex. 7.

conducting the operations at a polling place], is a significant indication to many black persons that voting places are now open to all, that black persons not only have a legal right to come and vote, they are welcome. And of course, the more black poll officials there are, the greater the confidence black persons will have in the election process, and the less fear they will have about participating in that process"); *see also United States v. Marengo County*, 731 F.2d 1546 (11th Cir.) ("two election practices exacerbated the deficiencies in black participation: the low number of black poll officials and the failure of the registrar to abide by state law. . . .By having few black poll officials and spurning the voluntary offer of a black citizen to serve as a registrar, county officials impaired black access to the political system and the confidence of blacks in the system's openness"), *cert. denied*, 469 U.S. 976, 105 S. Ct. 375, 83 L. Ed. 2d 311 (1984). The Hispanic voter registration and turnout for the PISD trustee elections are consistently as low as the proportion of Hispanic voting.[52]

Korbel and Dr. Flores testified that the PISD's limited number of polling places for the PISD elections, and their inconvenient location for minorities, have a negative impact on the turnout of minority voters.[53] *Cf. Perkins v. Matthews*, 400 U.S. 379, 91 S. Ct. 431, 436-37, 27 L. Ed. 2d 476 (1971) (in discussing the relocation of polling places under section 5 of the Voting Rights Act, the court noted that: the "abstract right to vote means little unless the right becomes a

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[52] 14.6 percent of registered voters in the PISD are Hispanic. Pls. Ex. 82.

[53] Defs. Ex. 42.

reality at the polling place on election day. The accessibility, prominence, facilities, and prior notice of the polling place's location all have an effect on a person's ability to exercise his franchise. . . . Locations at distances remote from black communities or at places calculated to intimidate blacks from entering . . . might well have the effect" of denying or abridging the right to vote on account of race).

The PISD has a markedly small number of polling places for its size. The district covers an 85 square-mile area and includes nearly 20,000 residents; but has only 4 polling places, inconveniently located with respect to where the Hispanic population is concentrated. There is no public transportation in the City of Pasadena. Other districts overlapping or neighboring PISD, which are often smaller than PISD, have many more polling places. For example, Galena Park in the San Jacinto College District is smaller than PISD and has 7 polling places. Single-member District 8 in the Houston Independent School District is smaller than PISD and has 45 polling places. The city of Pasadena has a population half the size of Pasadena's and uses more than 25 polling places for its elections.

For the December 1995 school bond election, the PISD used the same 4 polling places used for school board trustee elections, but also used mobile polling places which reached 10 sites before the election. The PISD held longer election hours for the bond election than it does for the school board trustee elections, keeping polling places open during PTA meetings and evenings. The voter turnout was significantly higher for the bond election than it was for any school board elections. No precise figures on voter turnout were offered into evidence. No evidence on minority voter

turnout for the school bond election was presented. Defendant and PISD trustee Blair testified that the bond election involved more controversial issues than did the school board elections; and that the controversy justified the exceptionally longer voting hours, the more numerous polling places and the higher turnout for the school bond election.

The evidence of voting barriers is credible and unrebutted. These *Zimmer* barriers are reflected in the lack of participation of the Hispanic community in the political process of selecting PISD trustees.

B. Candidate Slating Process

A group called Communities United for Better Schools ("CUBS") has played a significant role in the campaigns of successful candidates. Newspaper articles about PISD elections repeatedly referred to candidates running on the "CUBS ticket" or under the "CUBS banner." CUBS backed Orozco in two of her three candidacies for PISD Board. Orozco is the only Hispanic candidate to have received CUBS' endorsement.

The analysis of PISD campaign contributions from 1986-1993 indicates that of the seven or eight biggest contributors, all contribution checks were written on the same date. The biggest contributor, Barmore Insurance Company, did not contribute to any Hispanic candidate until Orozco's second race in 1990.[54] These contribution patterns are

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[54] Barmore also provided telephones for use in phone banks.

consistent with a candidate slating group.

The court finds that CUBS has functioned as a slating committee for candidates for the PISD Board. There is no evidence as to whether CUBS continued to do so after the 1996 elections.

C. Vestiges Within the School System

Dr. Flores testified to the underrepresentation of Hispanics on the PISD Board. Dr. Flores calculated the degree of underrepresentation by subtracting the percent of Hispanic population from the percent of Hispanic representation.

Hispanics have been consistently underrepresented on the PISD Board, by an average of 19.1 percent between 1980 and 1995. The aggregate index of inequity over that fifteen-year period is -306 percent.[55] The degree of underrepresentation was higher in 1995 (-22.5 percent), with one Hispanic board member, than it was in 1980, with no Hispanic on the board (- 17.6 percent).

The Hispanic student population has been consistently underrepresented on the PISD Board, by an average of 26.7 percent, between 1981 and 1993.[56] The aggregate index of inequity over a twelve-year period is -346.9 percent. The degree of underrepresentation was highest in 1993 (32.9

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[55] Pls. Ex. 8; Docket Entry No. 166, pp. 56-59.

[56] Pls. Ex. 9-3.

percent), with one Hispanic board member. The degree of underrepresentation steadily increased between 1981 and 1986; decreased between 1986 and 1987, when a Hispanic was elected to the school board; and then increased steadily again between 1987 and 1993.

D. Socioeconomic Factors

According to the Texas Employment Commission, the unemployment rate in Harris County in July 1994 was an average of 7.1 percent for all populations; 9.3 percent for Hispanics; 14.2 percent for African-Americans; and 4.3 percent for non-minorities. In January 1995, the unemployment rate was 6.2 percent for all populations; 8.2 percent for Hispanics; 12.6 percent for African-Americans; and 3.8 percent for non-minorities.[57]

According to the 1990 census, 13.9 percent of the population of PISD is below the poverty line.[58] 21.2 percent of the Hispanic population, 20.8 percent of the African-American population, and 12.1 percent of the Anglo population of PISD had a 1989 income below the poverty level. The per capita income for all Caucasians, including Hispanics, is $13,043, $10,175 for African-Americans, and $7,386 for Hispanics. According to the 1990 census, approximately 78.6 percent of the caucasian population within the PISD, including Hispanics, has an annual household income of at least $15,000, 74.9 percent of the African-

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[57] Pls. Ex. 5.

[58] Pls. Ex. 6.

American population of the PISD has an annual household income of at least $15,000, and 72.1 percent of the Hispanic population of the PISD has an annual household income of at least $15,000.

Approximately 5.4 percent of the Anglo population over the age of 25 of the PISD is functionally illiterate. Approximately 5.2 percent of the African-American population of the PISD over the age of 25 is functionally illiterate. Approximately 34.0 percent of the Hispanic population of the PISD over the age of 25 is functionally illiterate. According to the 1990 census, 30.3 percent of the total population of the PISD over the age of 25 did not graduate from high school. Approximately 26.9 percent of the Anglo population of the PISD over the age of 25 did not graduate from high school. Approximately 20.3 percent of the African-American population of the PISD did not graduate from high school. Approximately 58.0 percent of the population over the age of 25 of the Hispanic population did not graduate from high school. According to the 1990 census, 12.3 percent of the total population of the PISD over the age of 25 are college graduates. Approximately 12.7 percent of the Anglo population of the PISD over the age of 25 are college graduates. Approximately 18.9 percent of the African-American population over the age of 25 of the PISD are college graduates. Approximately 4.5 percent of the Hispanic population of the PISD over the age of 25 are college graduates.

The socioeconomic data before this court does not distinguish between Hispanics who are recent immigrants and those who have been in this country for longer periods, particularly those who are citizens. This information is

important to this analysis, but was not presented. The data before this court does not show that these socioeconomic differences between the white and Hispanic communities in the PISD interfere with Hispanic citizens' meaningful participation in the political process. *Clements*, 999 F.2d at 866-68; *see also Clark*, 88 F.3d at 1399 (proof of socioeconomic disparities "without more" was insufficient to show the presence of this factor).

E. Exogenous Elections

Dr. Alford testified that an analysis of primary elections is preferable to general elections because primary elections are nonpartisan and cannot be influenced by the partisanship factor. Dr. Flores testified that a study of general elections includes a broader cross-section of the voting population than primary or run-off elections. The court finds that the primary elections examined by Drs. Flores and Alford are insufficiently probative of general voting behavior to be helpful in this case. The court therefore examines the exogenous general elections.

1. Regression Analyses of Exogenous General Elections

Dr. Flores testified that he examined exogenous general elections in which minority candidates ran against Anglo candidates. Dr. Flores analyzed the performance of the minority candidates against the Anglo candidates in precincts either partially or wholly contained within the PISD jurisdiction.

In exogenous elections between 1986 and 1990, in

which minority candidates ran, the results of Dr. Flores's regression analysis were as follows: [See Exhibit 5]

For 1994 and 1996 exogenous elections, Dr. Flores repeated the analysis he had conducted for the 1986-1990 elections. Dr. Flores did not identify the position for which the candidates ran in the 1994 and 1996 exogenous elections examined; or identify all the candidates running in the 1994 elections. Dr. Flores testified that, in exogenous elections in 1994 and 1996 in which minority candidates ran, the results of the regression analysis of Hispanic voting were as follows: [See Exhibit 6]

Dr. Flores testified that the PISD jurisdiction included an unusual number of precincts with very small voter registration numbers. In such precincts, the correlation was overly sensitive to the small numbers of votes cast.[59] Dr. Alford testified generally, that with small data sets, any occurrence could be the result of chance. Dr. Flores repeated his analysis of 1994 and 1996 elections after removing as data points precincts which included fewer than 100 registered voters. For the 1994 elections, Dr. Flores studied 77 precincts, removing 35 precincts with fewer than 100 registered voters; for the 1996 elections, Dr. Flores studied 81 precincts, removing 30 precincts with fewer than 100 registered voters.[60] In removing small precincts, Dr. Flores

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[59] For example, Dr. Flores noted that in precinct 762, which included 0 Spanish-surname registered voters, only one vote was cast; the result showed that the candidate who received that vote got 100 percent of the precinct's support. Pls. Ex. 66.

[60] Pls. Exs. 78, 80.

did not remove many votes from the "n" analyzed, and in fact removed more votes cast for the Hispanic candidates than for the Anglo candidates.[61] Dr. Flores did not remove any precincts in his examination of the 1986 to 1990 exogenous elections. Several small precincts removed from the 1994 and 1996 analyses were created by the Harris County redistricting after 1990.

Dr. Flores testified that the narrower analysis of precincts, including only precincts with more than 100 registered voters, resulted in estimated levels of support received by Hispanic candidates similar to those found in the first analysis. However, the R coefficients in the second analysis indicated stronger relationships than did the original analysis; the R coefficients for the narrower analysis were in the .6 to .7 range, as opposed to the .3 to .4 range found in the original analysis.[62]

Dr. Alford testified that instead of simply removing small precincts from his analysis, Dr. Flores could, and perhaps should, have weighted the precincts according to their registered-voter size.[63] Weighting is a method used to emphasize the importance of certain data points over others; it can be proportional (in which case the "n" stays constant)

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[61] Dr. Flores testified that, in the 1994 elections, 39,540 votes were cast in total. By looking at only 77 precincts, Dr. Flores studied 39,063 votes. The difference was 1.2 percent. Pls. Ex. 68.

[62] Pls. Exs. 81, 79.

[63] For example, if a total registered voter population equaled 100, a precinct with one voter would carry a 1/100 weight.

or multiplicative (the "n" increases). Dr. Alford also testified, however, that voting rights cases generally do not resort to weighted regressions. Dr. Flores testified that the practice of weighting is debated in the statistics field because of the fear of masking data.

2. General Analysis of the Exogenous Elections

The only incumbents defeated in the exogenous general elections examined by Dr. Flores and Korbel were Mexican-American. Dr. Flores did not analyze the effect of incumbency on the election results.

Dr. Flores testified that the exogenous election results are consistent with racially cohesive and polarized voting because Hispanics voted in high percentages for Hispanic candidates, yet those candidates were defeated by Anglo bloc voting. Dr. Flores testified that in every 1994 and 1996 exogenous general election examined, with the exception of the Medina election, the preferred minority candidate was defeated within the PISD jurisdiction. While Anglos did support Hispanic candidates in exogenous elections, they did not do so to the degree that Hispanics did. Dr. Flores testified that party affiliation was a significant factor accounting for Anglo support of Hispanic candidates in general elections.

Dr. Flores testified that every preferred minority candidate (defeated within the PISD) was a Democrat. Medina was a Hispanic candidate but was not the preferred minority candidate; Medina was a Republican. Dr. Flores did not know the extent to which straight-ticket voting influenced the results of the exogenous general elections. Dr. Flores testified that he could not estimate the degree of influence which party

affiliation had on this analysis.

Dr. Alford testified that the partisan nature of the exogenous elections severely limited the value of the analysis. But *see Houston*, 56 F.3d at 612 ("while evidence that divergent voting patterns are attributable to partisan affiliation . . . rather than race is quite probative on the question of a minority group's future success at the polls, . . . evidence that lacks such evaluation of the voters' possible motivations still carries probative value"). Dr. Alford testified that, in the 1994 and 1996 exogenous general elections analyzed, every winner was Republican but not every winner was Anglo.[64] Looking at the 1996 Medina candidacy and the 1994 performance of Morales in precinct 29, Dr. Alford testified that the pattern of the election results indicated that party affiliation explained voting behavior better and more consistently than race.

Dr. Alford testified that the homogeneous precinct analysis of exogenous elections is hindered by the absence of polling places 90 percent or more Hispanic, and by the limited number of polling places or observation points. Dr. Flores testified that, although there were no homogeneous polling places within the PISD, there were several homogeneous precincts wholly or partially contained in the PISD.

The exogenous elections analyzed within the PISD jurisdiction reveal Hispanic political cohesion. However, the elections do not show whether the preferred minority

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[64] Pls. Ex. 69.

candidates are defeated in the PISD because of racial polarization or because of factors such as incumbency and party affiliation.

F. Racial Appeals

Plaintiffs did not argue that political campaigns in the PISD have been characterized by overt or subtle racial appeals.

G. Responsiveness of the PISD

Plaintiffs did not challenge the responsiveness of the PISD.

H. The Value of the State's Interest

The state's interest in maintaining the PISD at-large election system must be weighed against the plaintiffs' claim of racial dilution. *Clements*, 999 F.2d at 868.

The PISD uses the at-large election system so that each member of the PISD board of trustees will in effect represent every student and every parent within the PISD. In this way, the school board feels that they avoid the factionalism that they fear would divide a single-district elected board. Testimony at trial established that the current board of trustees acts as a harmonious unit. Individual members may disagree over policy decisions, but they have worked together to enact the edicts of the board.

The Fifth Circuit has recognized that the state may have legitimate interest in such at-large voting. *Clements*, 999

F.2d at 868; *see also Brewer*, 876 F.2d at 454-55.

VII. Evidence of Invidious Discriminatory Intent

Plaintiffs argue that the PISD's maintenance of the current at-large election system and its failure to adopt a single-member-district election system are intentional acts of discrimination which violate the Fourteenth and Fifteenth Amendments. *Arlington Heights*, 97 S. Ct. 555 at 563; *Washington*, 96 S. Ct. at 2047-2048.

There is insufficient credible evidence that a discriminatory purpose motivated the PISD board members in their decision not to adopt a single-member-district election system. The PISD's failure to adopt a single-member-district election system by itself is not evidence of discriminatory intent. *See, e.g., LULAC v. Clements*, 999 F.2d at 868; *Brewer*, 876 F.2d at 454-55.

CONCLUSIONS OF LAW

I. *Gingles* I: A Sufficiently Large and Geographically Compact Group

To meet the first *Gingles* requirement, plaintiffs must show that it is possible to draw one or more majority-minority districts. Drawing majority-minority districts requires a minority population that is of sufficient size and compactness to allow for the construction of a compact and contiguous district in which the minority group can form an effective voting majority. "The first *Gingles* factor ensures that the minority has the potential to elect a representative of its own choice in some single-member district. . . . Absent a

satisfactory showing on the first *Gingles* factor, minority voters cannot claim that it is the current districting system . . . that is the source of their disproportionately weak political strength." *Clark*, 88 F.3d at 1406; *citing Growe*, 113 S. Ct. at 1084.

Plaintiffs must establish that it is possible to create a majority-minority district of voting-age citizens. *Gingles*, 106 S. Ct. at 2766; *McNeil*, 851 F.2d at 944-45; *Dickinson*, 933 F.2d at 503 ("a simple majority of eligible voters in the single-member district"); *Morris*, 894 F. Supp. at 1065 ("using data of voting age Hispanic citizens is the correct measure of the Hispanic population's ability to create a majority voting district"); *Milwaukee Branch of the NAACP*, 929 F. Supp. 1150 ("citizenship rates can be taken into account in resolving the issue whether a plaintiff has satisfied the first *Gingles* condition; individuals who are not citizens are not eligible voters; those ineligible to vote are not among those whose votes have been diluted within the meaning of section 2"); *Romero*, 665 F. Supp. at 854 (stating that *Gingles* refers to effective voting majorities, rather than raw population totals, as the touchstone for determining geographical compactness); *Skorepa*, 723 F. Supp. at 1388-89.

The 1990 census is inaccurate to some extent. However, the only estimates of the extent to which it is unreliable, and the only estimates of the current PISD population, are also unreliable estimates. The choice is between an outdated actual count and an estimated projection based in part on that count and in part on assumptions and mathematical applications. The population projections plaintiffs offered were not sufficiently accurate or reliable to

overcome the presumption of census accuracy. *See McNeil*, 851 F.2d at 945-46; *see also Graves*, 446 F. Supp. at 568; *see also Skorepa*, 723 F. Supp. at 1390. Plaintiffs have not established that, based on the 1990 census, the best available data before this court, it is possible to form a compact single-member district in the PISD that would have a majority of Hispanic voting-age citizens as residents.

II. *Gingles* II: Political Cohesion of the Minority

Plaintiffs must establish that the Hispanics in the PISD are politically cohesive. *Gingles*, 106 S. Ct. at 2766-67. The congruence between the number of votes cast for Hispanics in each polling area and the number of Spanish-surname voters in each polling area, and the regression analysis of Spanish surname signature counts against votes for Hispanic candidates, indicate that Hispanics voters vote heavily in favor of Hispanic candidates. This court concludes that the Hispanic community is politically cohesive. *Gingles*, 106 S. Ct. at 2769-70; *see also Teague*, 92 F.3d 283.

III. *Gingles* III: Legally Significant Bloc Voting

To establish legally significant white bloc voting, plaintiffs must demonstrate that the white majority votes sufficiently as a bloc to enable it usually to defeat the minority's preferred candidate, in the absence of special circumstances. *Gingles*, 106 S. Ct. at 2766. Plaintiffs "must present evidence of a white bloc vote that normally will defeat the combined strength of minority support plus white 'crossover' votes. It is the 'usual predictability of the majority's success [that] distinguishes structural dilution from the mere loss of an occasional election." *Rangel*, 8 F.3d at

244-45; *quoting Gingles*, 106 S. Ct. at 2769.

Between 1987 and 1997, Orozco was the only Hispanic candidate to gain the support of Anglo voters and election to the PISD board. *See Teague*, 92 F.3d at 288 ("the results of a couple of elections do not discount the presence of racial bloc voting[;] . . . a showing that bloc voting is not absolute does not preclude a finding of racial polarization[;] . . . to be legally significant, racial polarization need only be the usual pattern for a significant proportion of voters"). With the exception of Orozco, the Hispanic preferred candidates who ran for a position on the PISD board between 1987 and 1997 received very few votes from non-Hispanic voters. However, this court need not decide whether the absence of white votes for Hispanic preferred candidates is the result of racial polarization or of the absence of serious minority candidates.

IV. The Zimmer Factors

Hispanics have been consistently underrepresented on the PISD board. Hispanics in the PISD face hindrances to their participation in the political process of electing school board members. PISD's large population and size make it difficult for first-time candidates to run for office without using expensive forms of campaigning. The PISD Board has consistently failed to appoint Hispanic election officials. *See Graddick*, 593 F. Supp. at 131; *cf. Marengo County*, 731 F.2d at 1570. The very small number of polling places, the inconvenient location and hours of those polling places, and the lack of public transportation within the PISD, also discourage Hispanic voting. *See Perkins*, 91 S. Ct. at 436-37. The incumbents' system of pooling their campaign funds put

challengers at a financial disadvantage. The CUBS has been very influential in helping candidates raise funds and in determining which candidates are successful.

Insufficient evidence was presented at trial to establish that health concerns or any other socioeconomic factors hinder the Hispanic community's ıbility to participate effectively in the political process in the PISD. Plaintiffs do not contend that elected officials on the PISD Board have been unresponsive to the particularized needs of the Hispanic community.

The policy rationale underlying the PISD's use of the at-large system is not tenuous. The Board has made a valid policy choice to avoid single-member elections so that each Board member represents every student and every parent within the PISD. In this way, the Board seeks to avoid the factionalism that they fear would divide a single-district elected board.

V. The Totality of the Circumstances

Because plaintiffs cannot meet the first *Gingles* threshold, they have not established that they "do not have an equal opportunity to participate in the political processes and to elect candidates of their choice"; that the at-large election system used by the PISD denies or abridges their right to vote on account of their race, color, ethnicity; or that the at-large election system dilutes the vote of minorities or minimizes their electoral influence, in violation of their civil rights. *See Growe*, 113 S. Ct. at 1084 ("unless these [*Gingles*] points are established, there neither has been a wrong nor can be a remedy").

However, plaintiffs have raised serious and valid concerns that hindrances to equal opportunity to participate in the political process are present. The small number and inconvenient location of polling places, the short polling hours, the absence of minority election officials, and the incumbents' campaign-fund pooling system, in a district as large as the PISD, may hinder the Hispanic community from voting in the PISD elections and seeking election to the Board.

VI. The Fourteenth and Fifteenth Amendments

There is insufficient evidence of intentional discrimination against minorities in the PISD Board of Trustees elections. On the present record, this court does not find discriminatory intent, in violation of the Fourteenth or Fifteenth Amendments to the United States Constitution.

VII. Conclusion

Plaintiffs' theory of this case is that the current at-large election system and white bloc voting prevent minority candidates from being elected to the board of trustees of the PISD. Plaintiffs have raised valid concerns as to hindrances to Hispanic participation in the PISD political process. However, plaintiffs have not proven that it is possible to create a single-member district in which the majority of voting-age citizens is Hispanic. Because plaintiffs have not met the "necessary preconditions[]" set out in *Gingles*, 106 S. Ct. at 2766, this court must find in favor of defendants.

/s/_____
Lee H. Rosenthal
United States District Judge

EXHIBIT 1

	PISD POPULATION		PISD VAP	
	Number of Residents	Percentage of PISD Population	Number of Residents	Percentage of PISD Population
Anglo	116,104	62.07%	87,824	66.84%
Hispanic	56,529	30.22%	34,247	26.06%
African-American	7,371	3.94%	4,671	3.56%
"Other"	7,003	3.74-3.77%	4,675	3.56%
Total	187,047	100%	131,405	100%

EXHIBIT 2

KORBEL PLAN

HISPANIC POPULATION MEASURED	DISTRICT 1	DISTRICT 6
1990 VAP	55.07%	50.04%
1990 CITIZEN VAP	Not Available	Not Available
1995 VAP*	64.63%	58.50%
1995 CITIZEN VAP*	55.92%	47.48%
1996 VAP*	66.21%	59.90%
1996 CITIZEN VAP*	57.11%	48.96%
1997 VAP*	67.68%	61.22%
1997 CITIZEN VAP*	58.40%	50.21%
1998 VAP*	69.08%	62.47%
1998 CITIZEN VAP*	60.00%	51.57%

* denotes projections.

JOHNSTON PLAN

HISPANIC POPULATION MEASURED	DISTRICT 1	DISTRICT 6
1990 VAP	52.48%	44.01%
1990 CITIZEN VAP	Not Available	Not Available
1995 VAP*	60.85%	38.90%
1995 CITIZEN VAP*	52.89%	29.80%
1996 VAP*	62.56%	41.14%
1996 CITIZEN VAP*	54.68%	81.08%

* denotes projections.

PLAN A

HISPANIC POPULATION MEASURED	DISTRICT 1	DISTRICT 6
1990 VAP	52.94%	46.38%
1990 CITIZEN VAP	Not Available	Not Available
1995 VAP*	62.67%	54.43%
1995 CITIZEN VAP*	54.81%	44.33%
1996 VAP*	64.27%	55.73%
1996 CITIZEN VAP*	56.50%	45.63%

* denotes projections

PLAN B

HISPANIC POPULATION MEASURED	DISTRICT 1	DISTRICT 6
1990 VAP	52.74%	43.77%
1990 CITIZEN VAP	Not Available	Not Available
1995 VAP*	62.49%	51.91%
1995 CITIZEN VAP*	54.61%	41.84%
1996 VAP*	64.09%	53.24%
1996 CITIZEN VAP*	56.31%	43.15%

* denotes projections

EXHIBIT 3

A breakdown of the results of the PISD elections with Hispanic candidates between 1987 and 1997 is summarized below: [34]

YEAR (POS.)	CANDIDATE (* incumbent)	RACE	VOTES	PERCENTAGE OF VOTES RECEIVED IN: TOTAL	PASADENA	S.HOUSTON	RAYBURN	DOBIE
1987(1)	Orozco	H	2,428	46.18%	45.58%	48.89%	57.22%	21.79%
	Slaton	W	1,164					
	Seiler	W	1,127					
	Shumrick	W	554					
	Total Votes Cast:		5,263	100%	100%	100%	100%	100%
1987(2)	Elam	W	3,552	61.29%	68.96%	67.39%	72.21%	55.86%
	Garner *	W	1,804					
	Valdez	H	286	7.18%	4.87%	5.62%	7.18%	5.39%
	Total Votes Cast:		5,273	100%	100%	100%	100%	100%
1988(5)	Blair	W	1,860	53.32%	66.04%	55.84%	73.97%	19.89%
	Robinson	W	952					
	Razo	H	622	14.53%	10.85%	47.02%	9.58%	4.89%
	Early	W	378					
	Total Votes Cast:		5,552	100%	100%	100%	100%	100%
1989(6)	Kendrick	W	2,977	66.09%	80.81%	53.72%	82.30%	66.03%
	Garvey-Montanez	H	198	5.31%	5.69%	13.86%	4.19%	33.51%
	Koons	W	49					
	Rudd	W	37					
	Total Votes Cast:		3,359	100%	100%	100%	100%	100%
1990(2)	Orozco	H	668	81.5%	78.61%	90.25%	54.75%	55.42%
	Jackson	W	149					
	Total Votes Cast:		792	100%	100%	100%	100%	100%
1992(1)	Roberts	W	3,258	53.41%	48.52%	45.39%	48.45%	61.71%
	Graham	W	1,503					
	Briseno	W	1,249					
	Gutierrez	H	223	3.35%	2.88%	4.19%	2.80%	2.12%
	Total Votes Cast:		6,683	100%	100%	100%	100%	100%
1992(2)	Orozco *	H	4,370	68.59%	68.57%	61.76%	68.33%	80.89%
	Maxwell	W	2,002					
	Total Votes Cast:		6,421	100%	100%	100%	100%	100%
1993(3)	N. Sullivan	W	3,884	63.14%	66.65%	52.60%	82.34%	41.20%
	Andrews	W	1,784					
	Leatherman	W	348					
	Hall	W	168					
	Garcia	H	118	1.87%	1.85%	2.53%	1.88%	2.36%
	Crawford	W	64					
	Total Votes Cast:		6,210	100%	100%	100%	100%	100%
1994(4)	T. Sullivan	W	2,106	48.36%	44.79%	50.64%	57.13%	50.38%
	Jordan	W	894					
	Castillo	H	347	18.99% together	18.74% together	11.27% together	5.38% together	14.64% together
	Perez	H	149					
	Ellsworth	W	66					
	Evans	W	47					
	Total Votes Cast:		3,607	100%	100%	100%	100%	100%
1994(5)	Blair *	W	1,898	66.89%	57.80%	66.72%	61.89%	31.28%
	McClain	W	494					
	Bennett	W	434					
	Briseno	W	354					
	Segura	H	214	6.86%	10.40%	8.87%	4.23%	7.69%
	Total Votes Cast:		8,594	100%	100%	100%	100%	100%
1997(3)	Blair *	W	1,243	71.31%	84.89%	73.74%	82.67%	64.87%
	Phillips	W	250					
	Gonzalez	H	129	7.45%	6.53%	10.89%	6.16%	10.87%
	Total Votes Cast:		1,731	100%	100%	100%	100%	100%

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EXHIBIT 4

REGRESSION ANALYSIS OF 1987-1997 PISD ELECTION RESULTS

YEAR	CANDIDATE	R	SLOPE	Y-INTERCEPT	R^2
1987	Valdez	.598	.208	5.639	.351
	Orozco	-.0176	.048	43.989	.0003
1989	Garvey-Montanez	.712	2.11	-1.550	.512
1990	Orozco	.782	.504	76.026	.611
1993	Gutierrez	.158	.046	2.901	.025
	Orozco	-.727	-.858	72.340	.519
	Garcia	.990	.208	.405	.967
1994	Perez	.955	.427	.003	.912
	Castillo	-.167	-.085	.082	.028
	Segura	-.726	-8.879	1.050	.527
1995	Hernandez	.745	.562	2.421	.555
	Perez	.826	1.143	1.970	.682
1997	Gonzalez	.914	.N/A	.021	.N/A

EXHIBIT 5

REGRESSION ANALYSIS OF EXOGENOUS 1986-1990 GENERAL ELECTIONS

ELECTION	CANDIDATE	R	R^2	Y-INT	ESTIMATED ANGLO VOTE	ESTIMATED HISPANIC VOTE
1986-Supreme Court, Pl. 4	Gonzalez	.68	.46	.44	44.0%	>99%
1988-Supreme Court, Pl. 4	Gonzalez	.74	.55	.475	47.5%	>99%
1988-179th Dist. Ct.	Guerrero	.74	.54	.412	41.2%	>99%
1988-351st Dist. Ct.	Salinas	.69	.47	.427	42.7%	>99%
1990-Attorney General	Morales	.66	.44	.391	39.1%	>99%
1990-157th Dist. Ct.	Garcia	.67	.45	.399	39.9%	>99%
1990-314th Dist. Ct.	Fraga	.64	.41	.394	39.4%	>99%

EXHIBIT 6

REGRESSION ANALYSIS OF EXOGENOUS 1994 AND 1996 GENERAL ELECTIONS

YEAR	CANDIDATE	R	R^2	Y-INTERCEPT	ESTIMATED ANGLO SUPPORT	ESTIMATED HISPANIC SUPPORT
1994	Morales	.230	053	.441	44 1%	77 2%
1994	Correa	.378	143	.282	28 2%	89 0%
1994	Mendoza	.390	152	.319	31 9%	93 6%
1994	Guerrero	.328	107	.337	33 7%	86 6%
1994	Fraga	.378	143	.302	30 2%	92 0%
1994	Hinajosa	.397	158	.308	30 8%	94 5%
1994	Mejia	.356	127	.323	32 3%	91 0%
1994	Leal	.367	134	.337	33 7%	92 0%
1996	Morales	.475	226	.381	38 1%	98 5%
1996	Uribe	.462	214	.333	33 3%	95 0%
1996	Garcia	.426	181	.425	42 5%	98 9%
1996	Medina	.409	167	.603	60 3%	8 0%
1996	C Garcia	.434	188	.416	41 6%	99 3%
1996	Salinas	.437	191	.392	39 2%	98 0%

APPENDIX C

42 § 1973

Denial or abridgement of right to vote on account of race or color through voting qualifications or prerequisites; establishment of violation

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.

(b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class affected in numbers equal to their proportion in the population.

Supreme Court, U.S.
FILED
JUN 25 1999
CLERK

No. 98-1747

IN THE

Supreme Court of the United States

ROSALINDA L. PEREZ, *et al.*,

Petitioners,

v.

PASADENA INDEPENDENT SCHOOL DISTRICT, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

When determining minority voting strength under the test of *Thornburg v. Gingles*, 478 U.S. 30 (1986), may a plaintiff's case rest on estimates of voting age population that include substantial numbers of non-citizens who are ineligible to vote, or must the plaintiff demonstrate voting strength on the basis of eligible voters, at least where the defendant has demonstrated that a substantial percentage of the plaintiff class are not citizens?

When determining minority voting strength under the test of *Thornburg v. Gingles*, 478 U.S. 30 (1986), may a plaintiff's case rest on the use of "influence districts" to overcome the fact that the plaintiff's proposed districts do not contain an actual majority of eligible voters, at least where the defendant has demonstrated that a substantial percentage of the plaintiff class are not citizens?

PARTIES TO THE PROCEEDING

The petition accurately lists the parties to the proceeding.

The following are the current members of the Board of Trustees of Pasadena Independent School District:

Mr. Fred Roberts

Mr. Bob Blair

Mr. Marshall Kendrick

Mrs. Vickie Morgan

Mrs. Carmen Orozco

Mrs. Nelda Sullivan

Mr. Ted Sullivan

The Superintendent is Dr. Frederick H. ("Rick") Schneider.

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Appendix A — Relevant Statute 1a

ORDERS BELOW

The order of the Fifth Circuit Court of Appeals is reported at 165 F.3d 368 (5th Circuit 1999), and is set forth in Petitioners' Appendix A, pages 1a-15a. The District Court's Order of March 13, 1997 is reported at 958 F. Supp. 1196 (S.D. Tex 1998), and is set forth in Petitioners' Appendix B, pages 16a-87a.

STATEMENT OF JURISDICTION

The Court of Appeals entered its judgment on January 29, 1999. Petitioners invoke 28 U.S.C. § 1254(1), which provides for review by the Supreme Court by writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

STATUTORY PROVISION INVOLVED

The statutory provision involved in this case is Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, the text of which is reprinted in Respondents' Appendix at App. A.

STATEMENT OF THE CASE

On March 13, 1997, the District Court entered its Memorandum and Opinion, the subject of this appeal. In this voting rights case, petitioners challenged the at-large voting system for electing members of the school board for the Pasadena Independent School District ("PISD"). Petitioners contend that the current system dilutes the votes of politically cohesive Hispanics in the PISD, in violation of Section 2 of the Voting Rights Act, 42 U.S.C. § 1973,

et seq. In applying *Thornburg v. Gingles*, 478 U.S. 30, 50 (1986), the district court found that Petitioners failed to establish the first element of the *Gingles* threshold factors because they did not show that it was possible to draw one or more districts in the Pasadena I.S.D. with a majority Hispanic citizen voting age population. (Pet. App. 4a, 6a). Petitioners argued that it was possible to develop a plan for seven single-member districts using 1990 census data (the "Korbel Plan"). District 1 of the Korbel Plan contained 55.07 percent of Hispanic voting-age population and District 6 contained 50.04 percent Hispanic voting-age population. (Pet. App. 30a). The Korbel Plan did not take into account the citizenship of the voting-age Hispanics. (Pet. App. 30a). The court found that using the 1990 census data, none of the districts in the proposed plans had a Hispanic voting-age population of at least 62.1 percent, or a citizen voting-age population of at least 50 percent. (Pet. App. 37a) The court also found that the Korbel Plan proposed districts were irregularly shaped, and evidenced a lack of geographic compactness. (Pet. App. 37a). The un-rebutted testimony of Respondent's expert, Dr. John Alford, was that the Korbel Plan had a population deviation of approximately 32 percent. (Pet. App. 38a). The district court found that the proposed districts were flawed by a citizenship population of less than 50 percent, a population deviation of over 10 percent, and irregular shapes. (Pet. App. 38a). The district court found that the Hispanic community in the PISD is politically cohesive. (Pet. App. 66a). The district court believed that in determining whether racial polarization is present in a particular election, a court should distinguish between the serious candidates and the non-serious candidates. (Pet. App. 67a-68a). The district court found that in the analysis presented to the court by petitioners that they did not attempt to distinguish "serious" candidates

from non-serious candidates on any basis. (Pet. App. 68a). The district court did not decide whether the absence of white votes for Hispanic preferred candidates is the result of racial polarization or of the absence of serious minority candidates. (Pet. App. 85a). The court found that because Petitioners cannot meet the first Gingles threshold, they have not established that they "do not have an equal opportunity to participate in the political process and to elect candidates of their choice"; that the at-large election system used by the PISD denies or abridges their right to vote on account of their race, color, ethnicity; or that the at-large election system dilutes the vote of minorities or minimizes their electoral influence, in violation of their civil rights. (Pet. App. 86a).

The Pasadena Independent School District is governed by a seven member Board of Trustees. (Pet. App. 3a). All Trustees are elected on a non-partisan basis, by numbered posts, for overlapping three-year terms so that in one year two will be elected. There is one Hispanic presently serving on the Board and she is beginning her fifth term. No African American has run for the board since 1986. There have been no appointments of any persons regardless of color or ethnicity to the school board. The only incumbent on the school board who has ever been defeated ran against an individual who had previously served on the school board. Respondents believe that of the Hispanics who have run for the PISD school board, only two of these candidates could be considered serious candidates. One of these serious candidates, Carmen Orozco, is now serving her fifth consecutive term. At the time the case was heard by the district court, PISD had four polling places.[1]

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1. The PISD Board of Trustees voted in October of 1997, to voluntarily increase the number of polling places to ten (10) plus (Cont'd)

The Fifth Circuit Court of Appeals affirmed the decision of the district court and found that the district court correctly required that plaintiffs demonstrate that Hispanics would represent a majority of voting age citizens in a proposed district. (Pet. App. 10a).

REASONS FOR DENYING THE WRIT

This case presents a substantial question involving the application of citizenship to Section 2 of the Voting Rights Act as it relates to satisfying the first *Gingles* threshold element. The rule applied by the Fifth Circuit on this issue is not new but has evolved in the Fifth and other circuits without the benefit of clear guidance from the Supreme Court. It is clear from many of the reported decisions in the various circuits that have faced this issue, that these circuits would benefit from a clear and concise decision in this case. In *Barnett v. City of Chicago*, 141 F. 3d 699, 702 (7th Cir. 1998) "the court was not even certain whether in making the threshold inquiry the court should use total population, voting-age population, or voting-age population of citizens only." While this Court did not have to reach this issue in

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(Cont'd)
increase the number of early voting places from one (1) to four (4). Despite the suggestion at trial that the small number of polling places was reducing Hispanic turnout, the increase in the number of polling places for the 1998 school board elections did not raise the Hispanic share of the turned-out vote. In 1997, the most recent election held with four polling places, analysis of sign-in sheets showed that 7.4 percent of the voters had Hispanic surnames. Over seven elections from 1987 to 1997 (all with four polling places), the average Hispanic share of the turned-out vote was 7.1 percent. The same analysis for 1998 (with ten polling places, and an Hispanic candidate running for one of the two places in the election) showed that only 6.2 percent of the voters had Hispanic surnames.

Johnson v. De Grandy, 512 U.S. at 1008-09, the issue of citizenship is central to the case at hand. Absent clear guidance, lower courts have had to speculate as to what factors and evidence should be considered and relied upon in making the first Gingles threshold inquiry. Despite lack of guidance from this Court, the Fifth Circuit has property applied the correct legal standard when considering the issue of citizenship in determining the first *Gingles* threshold.

I.

THE PETITION MISREPRESENTS THAT THE HOLDING BY THE FIFTH CIRCUIT CREATED A NEW RULE FOR EVALUATING WHETHER OR NOT THE PLAINTIFFS SATISFIED THE GINGLES I THRESHOLD.

Petitioners allege that the decision by the Fifth Circuit established a New Rule for evaluating Plaintiffs' evidence on the Gingles I threshold factor which forecloses Section 2 challenges in an important class of cases. Respondents believe that this statement constitutes a misrepresentation of the holding of the Fifth Circuit or a misreading of the Fifth Circuit's decision by Petitioners. The Fifth Circuit in this case followed the same standard that it has followed in the previous cases that were before the court which focused on whether Section 2 plaintiffs could establish that they possessed the ability to elect candidates of their choice absent the challenged structure. The first case in which the Fifth Circuit addressed the issue of citizenship was *Campos v. City of Houston*, 113 F.3d 544, 548 (5th Cir. 1997). In *Campos* the court held that courts "must consider the citizen voting age population of the group challenging the electoral practice when determining whether the minority group is

sufficiently large and geographically compact to constitute a majority." *Campos*, 113 F.3d at 548. The decision of the Fifth Circuit in this case is but an expansion and evolution of the decision of the Fifth Circuit in *Westwego Citizens v. City of Westwego*, 946 F.2d 1109 (5th Cir. 1991). In *Valdespino v. Alamo Heights Independent School District*, 168 F.3d 848 (5th Cir. 1999), the Fifth Circuit, in interpreting *Westwego II's* statement, held "in context, *Westwego II's* statements did not alter what must be proved, only what can be used to prove it. The Hispanics still must meet their burden of proving that Hispanics constitute more than 50% of the relevant population in their demonstration district." The Fifth Circuit in *Valdespino* further "rejected the appellants' contention that a "majority" may be less than 50% of the citizen voting age population ." *Valdespino*, 168 F.3d 848 at 850.

Contrary to the assertions made by Petitioners, the Court of Appeals in this case did not adopt a "bright-line" test that may only be met by showing with census data that Hispanics exceed 50% of the citizen voting age population of the demonstration district submitted by plaintiffs to satisfy their burden under *Gingles I*. The district court and the Court of Appeals considered plaintiffs' evidence regarding elections in similar districts and the projected growth of the Hispanic population, but the district court found plaintiffs' projections unreliable. (Pet. App. 11a). What the district court did say was "this Court does not find the projected population growth estimated by plaintiffs to be sufficiently reliable to overcome the presumption of census accuracy". (Pet. App. 47a). The district court further found that Respondents expert, Dr. John Alford's testimony and criticism of plaintiffs' population projections to be credible. (Pet. App. 46a). In *Valdespino*, the Fifth Circuit

affirmed the decision of the district court in allowing the defendant school board to use evidence to counter the Plaintiffs' census data because the district court found that the school board's 1997 population data overcame the 1990 census figures. *Valdespino*, 168 F.3d at 854. It is misleading for Petitioners to suggest or imply that the district court and the Court of Appeals excluded other evidence presented by Petitioners to show the "geographic insularity" requirement of *Thornburg v. Gingles*. The flexibility of the Fifth Circuit is further demonstrated in Note 18 of *Valdespino*, "it is sufficient to conclude that there has been significant demographic changes [sic] since the decennial census and that there exist [ ] post-decennial population data that more accurately reflect [ ] evidence of the current demographic conditions." It also appears that Petitioners have either misinterpreted what the Fifth Circuit meant by the term "bright line test" or they are deliberately trying to mislead this Court. In *Valdespino*, 168 F.3d at 852, the Fifth Circuit held that "it interpreted the *Gingles* factors as a bright line test. Each factor must be proved before it is necessary to proceed to the totality of the circumstances test."

Petitioners have also challenged and called into question the reliability of the citizenship census data because it is based upon sample data, rather than the actual headcount used for redistricting. The objections to the use of the census citizenship data are without merit. The one-in-six sample used for most of the census questions is an extremely large sample. A typical national sample for a research study or public opinion poll consists of fifteen hundred to twenty-five hundred respondents. The census sample exceeds ten million respondents. In fact, it is the largest sample for any survey conducted anywhere in the world. (Tr. Vol. VI,

p. 62). There is no question that because the citizenship information is based upon a sample population, it cannot be as precise as the census data, which is based upon the entire population. However, the use of sample data is a long standing statistical technique, whose limits are known and measurable. This Court should not reject the citizenship statistics solely because they are based on sample data without some indication that the sample data is tainted in some way. There were no arguments presented by Petitioners before the district court or the Court of Appeals that the sample was skewed in a statistically significant way due to improper sampling method, small sample size, or sheer random error. Much of the evidence presented and relied upon by Petitioners in this, and other VRA cases comes from this same census sample, including data on income, employment, and education differences affecting minorities. All of those statistics also came from sample data and were gathered in exactly the same manner as the citizenship census data. Petitioners should not be allowed by this Court to take inconsistent positions by touting the sample data when it suits their purposes and then dispute the validity of the sample census data when it does not. Petitioners have also failed to cite any legal or expert authority which would lend credence to their attack on the reliability of the citizenship census data. When Respondent's expert, Dr. John Alford, was asked directly if there were any documents, surveys, cases or anything else which cast a shadow upon the reliability of the information contained in the STF-3 file, he said that "he was not aware of any." (Tr. Vol. VI, p. 72). The testimony of Respondent's expert, Dr. John Alford, regarding the reliability of the citizenship census data, was not rebutted or challenged by Petitioners or their experts. Moreover, as pointed out at trial, the census measure of citizenship is a

conservative one, with any net error working in favor of the plaintiffs. Non-citizens tend to inaccurately report that they are citizens for several reasons. Permanent legal residents (including those who have applied for, but not yet received citizenship) may report themselves as citizens to indicate the permanent and legal status of their residence here. Those non-citizens here illegally may fear the consequences of reporting their non-citizen status to the federal government, despite the efforts of the Census Bureau to assure respondents that the information will not be passed to the INS. There are no countervailing forces that would make citizens likely to report that they are non-citizens. Thus, these systematic errors favor the plaintiffs in these cases by inflating the citizen count.

The argument that the citizenship data can not be made available in a timely fashion is also without merit.[2] The production of the appropriate data in the early 1990s was delayed largely because the data tables that reported citizenship by race and ethnicity were produced by the Census Bureau only on request, and not as a part of the routine STF-3 data release. There is nothing to hinder the routine inclusion of such tables in the standard census data release. Similarly, the argument that citizenship data is not appropriate for redistricting use because it is available at the block-group level rather than the block level, is without merit. (Tr. Vol VI, pp. 65-66). Block level data can easily

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2. The United States Census Bureau expects to release the "long form" data, including the citizenship data, during the period from June through August of 2001. (Census 2000 Operational Plan, January 1999, U.S. Dept. of Commerce, page 84). This is only a few months after the April 1 release deadline of the P.L. 171-94 basic redistricting data, not "several years" as alleged by the petitioners. (p. 7).

be estimated from the block-group data if need be, and in any case, drawing districts block by block is a process that has been viewed with disfavor by the courts. *Bush v. Vera*, 517 U.S. 952, 961. Further, the fact that citizenship data is only available at the block group level, without proof that this will cause the data to be tainted and unreliable, should not cause this Court to reject the data.

Moreover, even if there was merit to any of these concerns, they could easily be alleviated. The citizenship data, if deemed useful, could simply be moved from the sample to the full-count form of the census. The distinction between topics included in the full count data (termed the 'short form' by the Census Bureau) and the one-in-six sample data (termed the 'long form' by the Census Bureau) has been fairly fluid over time. Prior to the 1950 census, everyone received the long form. The move to a sample of the population for the long form began with the 1950 census, and various questions have been moved between the two forms in each subsequent census. As recently as the 1990 census, the short form included such questions as marital status, housing value, and rent paid. For the 2000 census the short form will, for the first time, contain only questions where data are both needed in response to legislative requirements and required at the block level. Thus by this new standard, citizenship data would be shifted to the short form if it were deemed useful for redistricting purposes.

Census data must be used unless someone comes forth with more reliable data. *McNeil v. Springfield Park District*, 851 F.2d 937, 946 (7th Cir. 1988), *cert. denied*, 490 U.S. 1031, 109 S. Ct. 1769, 104 L. Ed. 2d 204 (1989). Census figures are presumed accurate until proven otherwise. Proof of changed figures must be thoroughly documented, have a

high degree of accuracy, and be clear, cogent and convincing to overcome the presumptive correctness of the prior decennial census. *Valdespino*, 168 F.3d at 854.

The Korbel Plans submitted by Petitioners' expert, George Korbel, were irregularly shaped, evidencing a lack of geographic compactness, and also violated the one man-one vote principal. (Pet. App. 37a). *See Reynolds v. Sims*, 377 U.S. 533, 567-68, 84 S. Ct. 1362, 1384-95, 12 L. Ed. 2d 516, *reh'g denied*, 379 U.S. 870, 85 S. Ct. 12, 13 L. Ed. 2d 76 (1964). This Court has ruled that any deviation exceeding 10% is a prima facie violation of the one man one vote principal, creating a burden on the jurisdiction to justify the deviation. *Brown v. Thomson*, 462 U.S. 835, 842, 43, 103 S. Ct. 2690, 2696, 77 L. Ed. 2d 214 (1983). However the resulting justification cannot be for the reason of enhancing the political strength of a particular group. *Sims*, 377 U.S. at 577, 84 S. Ct. at 1389. During the trial in the district court no reason was advanced by Petitioners to justify the population deviations in their proposed plans in excess of 10% and the rationale behind their irregular shapes.

Petitioners have also asserted that the "plaintiffs established through election data that the submitted districts provide Hispanics with the potential to elect candidates of their choice." (Pet. 8). Petitioners have failed to attach any evidence to support this statement and Respondents do not believe that when citizenship is taken into account any such evidence exists. To include persons ineligible to vote on account of non-citizenship in the statistical pool would significantly overstate the degree of Hispanic electoral potential. *Burns v. Richardson*, 384 U.S. 73, 92-93 (1966).

II.

THE PETITION MISREPRESENTS THAT THE OPINION BY THE FIFTH CIRCUIT CONFLICTS WITH THE DECISIONS OF THIS COURT AND THOSE OF OTHER CIRCUITS.

Petitioners allege that the opinion by the Fifth Circuit is in conflict with the decisions of this Court and those of other circuits. Respondents believe that this statement is very misleading in that Petitioners have failed to cite one case either by this Court or any other circuit that is directly on point. This Court has thus far declined to answer directly the question of "which characteristic of minority populations (e.g., age, citizenship) ought to be the touchstone for proving a dilution claim." *Johnson v. De Grandy*, 512 U.S. 997, 1008, 114 S. Ct. 2647, 2656, 129 L. Ed. 2d 775 (1994). *Negron v. City of Miami*, 113 F.3d 1563, 1569 (11th Cir. 1997). The Petitioners in this case apparently contend that the holding in *Solomon v. Liberty County, Florida*, 899 F.2d 1012, 1018 n.7 (11th Cir. 1990) requires that voting age population statistics be used in Section 2 analysis instead of voting age citizenship population statistics. Of course, *Solomon* did not address that issue, because there was no indication in that case that there was any disparity between black and white citizenship rates. *Negron*, 113 F.3d at 1568. The holding in *Solomon* does not preclude a holding by this Court in this case that refinement with citizenship data is appropriate, where that data is available and indicates a significant difference in the citizenship rates of the majority and minority populations. Both of the opinions by the Eleventh Circuit, in *Solomon* and *Negron* are consistent with each other and the opinion of the Fifth Circuit in this case. The opinion of

the Fifth Circuit is also consistent with the opinions of the Ninth and Seventh Circuits. In *Romero v. City of Pomona*, 665 F. Supp 853, 854 (C.D. Cal. 1987), *aff'd*, 883 F.2d 1418 (9th Cir. 1989) the Ninth Circuit held that courts must consider the citizen voting age population in evaluating the first *Gingles* factor. *See also Skorepa v. City of Chula Vista*, 723 F. Supp. 1384, 1388-89 (S.D. Cal. 1989). As the Seventh Circuit held in *McNeil*, "those ineligible to vote have not expressed a dilution of their vote. They are not parties to a Section 2 claim." 851 F.2d at 945. *See also Barnett v. City of Chicago*, 141 F.3d 699, 704 (7th Cir. 1998), *cert. denied sub. nom., Bialczak v. Barnett*, 118 S. Ct. 2372, 141 L. Ed. 2d 740 (1998).

This Court first elaborated on what a minority group challenging an at-large election system must prove under Section 2 of the Voting Rights Act in *Thornburg v. Gingles*, 478 U.S. 30 (1986). In determining whether voter dilution has occurred, the *Thornburg* Court held that the minority Plaintiff must meet three preconditions to show that an at-large election system, as in the instant case, can be held to be dilutive of the right of any citizen of the United States to vote. The plaintiff must prove geographic compactness, political cohesiveness, and racial bloc voting to show that an at-large election system violates Section 2 of the Voting Rights Act.

The first precondition requires the minority group to prove that it "is sufficiently large and geographically compact to constitute a majority in a single-member district. If it is not, as would be the case in a substantially integrated district, the [at-large] form of the district cannot be responsible for minority voters' inability to elect its candidates." *Thornburg*, 478 U.S. at 50-51, 106 S. Ct. at

2766. This Court reasoned that this factor was important to show that the minority group had the potential to elect candidates of their choice absent the challenged election structure. *Gingles*, 478 U.S. at 50 n.17. The Petitioners further argue that the Supreme Court has disavowed "mechanical" application of the *Gingles* factors. In *Voinovich v. Quilter*, 507 U.S. 146, 158, 113 S. Ct. 1149, 1157, 122 L. Ed. 2d 500 (1993), this Court did say, "the *Gingles* factors cannot be applied mechanically and without regard to the nature of the claim."

Petitioners made this same argument in *Valdespino*, 168 F.3d at 852, n.2. This argument was rejected by the Fifth Circuit because it was not relevant to that case, which challenges a multimember district. The *Uno v. City of Holyoke*, 72 F.3d 973, 985-86 (1st Cir. 1995), case cited by Petitioners can be distinguished for two reasons. First, the *City of Holyoke* failed to make the claim in its brief that "the Hispanics, as a group, are insufficiently compact to constitute the majority in a third ward." *Uno*, 72 F.3d at 985 n.20. Second, the citizenship issue was not addressed by the First Circuit in *Uno* and the Court found that Hispanics would constitute a majority of the voters in at least three of fifteen reconstituted wards. *Uno*, 72 F.3d at 986, n.22. The *Uno* court did require that influence districts be considered in Section 2 cases. *Uno*, 72 F.3d at 991, n.34. It appears however, that the Supreme Court cases cited by the *Uno* court lend little or no support for this requirement. Further, the *Uno* court said "before the existence of any influence district is given significant weight in the balance, the evidence must reveal that minority voters in the district have in fact joined with other voters to elect representatives of their choice." *Uno*, 72 F.3d at 991, n.13. The *Sanchez v. State of Colorado*, 97 F.3d 1303 (10th Cir. 1996), case cited

by Petitioners can also be distinguished. First, the Sanchez case is a reapportionment case in which the Plaintiffs challenged the reconfiguration of their state legislative district, Colorado House District 60. Second, the citizenship issue was not addressed by the Tenth Circuit and the Court found that Hispanic population represented as much as 76.8% of Costilla County. *Sanchez*, 97 F.3d at 1314 n.9. In addition, the Tenth Circuit found that the district court "ought to have discussed appellants' statistical evidence more thoroughly because that was the principal evidence they offered and because their statistics had at least surface plausibility." *Sanchez*, 97 F.3d at 1316.

It appears that both the *Uno* court and the *Sanchez* court are confusing the term "fair opportunity to elect" with "potential to elect." If we are looking at the term "potential to elect" we must have a clear understanding of what this term means. As long as the minority seeking to challenge the structure can show that the minority population contains an actual majority of citizens eligible to vote we can determine that it is possible for the minorities to elect their preferred candidate without the assistance of anglo cross-over votes. The further we deviate from requiring a majority the more complex it becomes to determine at what point the minority has the potential to elect their preferred candidates. This is made more complex due to the fact that the number of cross-over voters will change from election to election. If this Court determines that "influence districts" be considered in Section 2 cases, the district court, as the trier of fact, will now be required to determine the number of cross-over voters needed from non-minority voters to determine potential to elect minorities' preferred candidates. We now would have the situation of the "dog chasing his tail." The more racially polarized the anglo voting pattern

the more difficult it becomes to determine the number of cross over votes required to determine potential to elect. The less racially polarized the Anglo voting pattern the easier it will be to determine potential to elect and the more complex it becomes to determine if the minority plaintiffs can satisfy *Gingles III*. If this Court requires that "influence districts" be considered in Section 2 cases, *Gingles I* as we know it will have been drastically amended, modified or rejected. In *Barnett v. City of Chicago*, 141 F.3d 699 (7th Cir. 1998) the Seventh Circuit did not reject the use of citizen voting age population as the exclusive measure for evaluating the plaintiffs' evidence as to the *Gingles I* factor as represented by Petitioners. The *Barnett* court said "we think that citizen voting-age population is the basis for determining equality of voting power that best comports with the policy of the statute." *Barnett*, 141 F.3d at 704, n.5. Petitioners have failed to cite one decision from any circuit, in which non-citizens were a significant part of the relevant population, whose decision conflicts with the decision of the Fifth Circuit in this case.

As the Fifth Circuit observed in *Brewer v. Ham*, 876 F.2d 448, 452 (5th Cir. 1989)

> the raison d'etre of *Thornburg* and of amended Section 2 is to facilitate participation by minorities in our political processes, by preventing dilution of their votes. Only voting age persons can vote. It would be a Pyrrhic victory for a court to create a single-member district in which a minority population dominant in absolute, but not in voting age numbers, continued to be defeated at the polls. Similarly, only voting-age persons who are United States citizens can vote.

A logical interpretation of the Voting Rights Act compels courts evaluating vote dilution claims under Section 2 to consider voting age and citizen voting-age population of the group challenging the electoral practice when determining whether the minority group is sufficiently large and geographically compact to constitute a majority in a single member district. In fact, this Court's language in *Thornburg* frequently refers to minority voters. When, as in this case, non-citizens are a significant part of the Hispanic population residing in PISD, the proper benchmark for the Courts in determining whether or not the plaintiff's have satisfied the *Gingles I* threshold is citizen voting-age population.

III.

THE DECISION OF THE COURT OF APPEALS IS NOT INCONSISTENT WITH THE INTENT OF THE CONGRESS IN THE 1982 AMENDMENTS TO THE VOTING RIGHTS ACT.

Petitioners allege that the decision of the Fifth Circuit is inconsistent with the intent of the Congress in the 1982 Amendments to the Voting Right Act. In *Thornburg*, this Court stated that "the authoritative source for legislative intent lies in the Committee Reports on the bill." *Thornburg*, 478 U.S. at 42 footnote.7[2b]. Petitioners have failed to point out with particularity the provisions of the Senate Report that are inconsistent with the decision of the Fifth Circuit is this case. Further, the Voting Rights Act refers repeatedly to protecting the rights of "citizens" to elect their preferred candidates. In *Thornburg*, this Court, in quoting the Senate Committee, said "there is no requirement that any particular number of factors be proved, or that a majority

of them point one way or the other." *Thornburg*, 478 U.S. at 43. In *Thornburg*, it was this Court that established the necessary preconditions for multimember districts to operate to impair minority voters' ability to elect representatives of their choice. These are commonly known as the "*Gingles*" factors. The Fifth Circuit Court of Appeals did not adopt a formalistic approach in evaluating vote dilution in this case. They said, "The appropriate method for establishing the first *Gingles* factor is a 'matter of fact' which the plaintiff must prove, but there is no 'uniform method.' " (Pet. App. 11a). What Petitioners are in reality seeking, is for this Court to abandon the *Gingles* factors, allow them to create single member districts with a top to bottom deviation in excess of 30%, and not require that the minority group be sufficiently large and geographically compact to constitute a majority in a single member district. (Pet. App. 38a). The creation of an influence district will not create a remedy, but may further frustrate minority voters who were placed in districts where they did not represent an effective majority. Petitioners' proposed "influence districts" provide only the illusion of a remedy. The intent of the Voting Rights Act was to provide actual remedies and not false hope. Instead of packing we would have "fracturing."[3] In *Thornburg*, this Court, in discussing white bloc voting said, " in general, a white bloc vote that normally will defeat the combined strength of the minority support plus white "cross-over votes rises to the level of legally significant white bloc voting." *Thornburg*, 478 U.S. at 34. It appears from this clear language that if the white bloc vote does not defeat

3. "Fracturing" or "cracking" as it is sometimes referred, is the process by which a minority group which could form a sizable minority in one district, is split into two or more districts, where the minority members constitute an ineffective political grouping in each.

the combined strength of the minority support plus white cross-over votes that we do not have legally significant white bloc voting. This would be the situation we would have with "influence districts." If this Court modifies or amends the standard from requiring the minority plaintiff to constitute a majority in a proposed single member district to show that it is feasible if they can influence the election, we would eviscerate both *Gingles I* and *III*.

A minority group cannot claim that it has been injured by the challenged structure unless it constitutes a majority in a single member district. *Thornburg*, 478 U.S. at 46, n.17. As this Court held in *Voinovich*, 113 S. Ct. at 1155, "Districts in which minority voters cannot 'dictate electoral outcomes independently,' but may 'elect their candidate of choice' due to 'sufficient cross-over from white voters' are influence districts, not geographically compact majority-minority districts that satisfy Gingles." The record in this case did not establish that the plaintiffs submitted a reasonable alternative that would afford Hispanics the opportunity to elect candidates of their choice. When citizen voting age population was taken into account neither of the plaintiffs' putative districts contained a majority of Hispanics. The top to bottom deviations exceeded 30% and were irregularly shaped, evidencing a lack of geographic compactness. (Pet. App. 38a). Further, the voting power of the citizens in PISD would be severely diluted if this Court were to allow "influence districts." Section 2 refers to denying citizens the right to vote. No reference is made in the Voting Rights Act that it was intended to protect non-citizens. It is clear that the potential for vote dilution was a primary concern of Congress when it amended Section 2. It is unfortunate however that Section 2 provides no guidance on how to balance the factors and thus determine

whether a challenged plan needlessly impairs a minority group's voting power. *Barnett*, 141 F.3d at 702.

The Fifth Circuits' decision in this case is consistent with the plain language of the Voting Rights Act; consistent with the clear and commonly applied standards of *Thornburg v. Gingles*, and with the decisions of every other circuit in which similar issues have been present and were addressed by the Court.

What the Petitioners are saying is that the application of the *Gingles* Threshold requirements is a mechanical application. Petitioners object that the Fifth Circuit has been applying citizenship in assessing *Gingles I* in a "bright line" or mechanical fashion. If their objection is to clear useful standards by which affected jurisdictions can understand and carry out their obligations under the Voting Rights Act, then this is, in effect, an objection that goes to the very heart of the rule of law. Clear and applicable standards are essential to the proper functioning of the legal system under a rule of law.

If the Petitioners' objection is to the mechanical nature of the application of this standard, then it is a gross mischaracterization of the decisions of the District and Appellate levels mindful of the need to make an intensely local appraisal and application of this Court's standards under *Thornburg v. Gingles*. The district court in this case and the other cited Fifth Circuit cases has made a lengthy and exhaustive inquiry into a host of factors and sources of evidence that bear on each of the *Gingles* factors. In fact, it is in making this local inquiry that the issue of citizenship arises in some but not all of the jurisdictions that have addressed or examined these issues.

It is the Petitioners who would in fact prefer a mechanical application in regard to *Gingles I*. They would require the court to use only total population without regard to local variations in factors such as age, eligibility to vote or citizenship that might affect the local usefulness of such a "mechanical" or "bright line" test.

In rejecting mechanical application of a simple population majority, the Fifth Circuit and other circuits that have addressed this issue, have done what the Petitioners are requesting be done; that is, consider all evidence available to the court in assessing whether or not the minority group in question has the potential to be an effective voting majority in a single member district.

The Fifth Circuit's analysis under *Gingles* was based upon the proper legal standard. The requirement of the Fifth Circuit that Petitioner demonstrate that the Hispanic community be comprised of a group of voting age citizens sufficiently large and geographically compact to constitute a *majority* in a single member district is in keeping with the language of Section 2 of the Voting Rights Act and consistent with the intent of Congress to extend the rights afforded under the Voting Rights Act to *citizens* of the United States. (Pet. App. 34a).

CONCLUSION

The Court should deny the petition for writ of *certiorari.*

Respectfully submitted,

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APPENDIX

APPENDIX A — RELEVANT STATUTE

42 U.S.C. § 1973

Denial or abridgement of right to vote on account of race or color through voting qualifications or prerequisites; establishment of violation

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.

(b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class affected in numbers equal to their proportion in the population.

No. 98-1747

In the Supreme Court of the United States

ROSALINDA L. PEREZ, ET AL., PETITIONERS

v.

PASADENA INDEPENDENT SCHOOL DISTRICT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether a racial or language minority plaintiff challenging an at-large voting system under Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973, may not make out a claim of vote dilution unless the plaintiff can show that the minority could constitute a majority in a single-member district.

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INTEREST OF THE UNITED STATES

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

1. This case is a challenge under Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973, to the system used to elect the Board of Trustees of the Pasadena (Texas) Independent School District (PISD). PISD is located in Harris County, and includes all of the cities of South Houston and Pasadena as well as parts of the City of Houston. Pet. App. 24a. The seven members of the Board of Trustees of PISD are all elected from the entire school district at-large, for staggered terms.

Each trustee is elected for a specific place on the Board and gains election by a plurality of votes for that position. Single-shot voting is not permitted. *Id.* at 3a.

Petitioners, Hispanic residents and citizens eligible to vote in elections for PISD, brought suit alleging that PISD's election system dilutes Hispanic voting strength in violation of Section 2. According to the 1990 census, almost 190,000 people live in PISD; Hispanics comprise approximately 30% of the total population and 26% of the voting age population (VAP) of PISD. Pet. App. 29a. Only one Hispanic has been elected to the PISD Board of Trustees. *Id.* at 3a.

At trial, petitioners presented a districting plan, based on data drawn from the 1990 census, designed to show that two single-member districts could be drawn with a majority Hispanic population and a majority Hispanic VAP. Pet. App. 30a. Respondents, however, maintained that, to state a claim under Section 2, petitioners were required to show that it was possible to draw a single-member district with a Hispanic majority of the *citizen* voting age population (CVAP). Further, according to a regression analysis performed by respondents' expert demographer, approximately 60% of voting age Hispanics in PISD are citizens. *Id.* at 35a-36a. Thus, respondents maintained (and the district court agreed) that a single-member district in PISD must have 62.5% Hispanic VAP to ensure a 50% Hispanic CVAP in that district. *Id.* at 36a-37a. The highest Hispanic VAP percentage for any of petitioners' proposed districts, however, was only 55.07%. *Id.* at 37a.

Petitioners also introduced evidence at trial showing that one potential single-member Hispanic-majority district for PISD, District 1 of the Korbel Plan, which had a 55.07% Hispanic VAP, substantially overlapped

geographically with City Council District C in the City of Pasadena. See 5/31/95 Tr. 18; 6/1/95 Tr. 99; 6/8/95 Tr. 94. Pasadena District C has a 55.4% Hispanic VAP. 5/3/95 Tr. 18; 6/2/95 Tr. 23. But even though only 60% of voting-age Hispanics in the area are citizens, voters in Pasadena District C have elected Hispanic representatives to the city council. 5/31/95 Tr. 18, 24-25; 6/1/95 Tr. 99; 6/2/95 Tr. 24. Hispanics actually made up the majority of persons turning out to vote in Pasadena District C in the 1995 election. 6/8/95 Tr. 94.

In addition, District 6 of the Korbel Plan, which had a Hispanic VAP of 50.04%, incorporated a substantial portion of the City of South Houston. 6/1/95 Tr. 101. Currently, the VAP of South Houston is about 55% Hispanic. *Id.* at 106. Evidence introduced at trial indicated that Hispanics have been elected at-large to the City Council of South Houston (including in 1981, when Hispanics constituted approximately 45% of the VAP of South Houston) and continue to have a high potential of being elected there. 5/3/195 Tr. 25-26.

Petitioners also introduced evidence showing that Hispanics had been elected in other districts in the area with a Hispanic VAP under 62.5%, including Texas House of Representatives District 143 (52% Hispanic VAP), Texas Senate District 6 (56% Hispanic VAP), and two Houston City Council Districts (53% and 55% Hispanic VAP). 5/31/95 Tr. 17-18, 24-25, 71-72; 6/2/95 Tr. 17.

2. The district court held that the existing election system in PISD does not violate Section 2. Pet. App. 16a-93a. The court observed that, under *Thornburg* v. *Gingles*, 478 U.S. 30 (1986), three preconditions to establishing a vote dilution claim under Section 2 are that a minority plaintiff show "*[f]irst* that the [minority] group is sufficiently large and geographically compact

to constitute a majority in a single member district; *second*, [that] it is politically cohesive and *third*, that the white majority votes sufficiently as a bloc to enable it usually to defeat the minority's preferred candidate." Pet. App. 19a.

Thus, the court stated, "[t]he threshold question is whether it is possible to draw one or more majority-minority districts in the PISD," and that "[d]rawing majority-minority districts requires a minority population that is of sufficient size and compactness to allow the construction of a compact and contiguous district in which the minority group can form an effective voting majority." Pet. App. 28a-29a (footnote omitted). The court then ruled that, to satisfy that threshold requirement under *Gingles*, "a plaintiff must establish that it is possible to create a district with a majority of minority voting-age *citizens*." *Id.* at 33a. Because petitioners had "fail[ed] to prove that it is feasible to create one or more districts in which a majority of voting-age citizens are Hispanic," *id.* at 38a, the court ruled that petitioners could not establish a violation of Section 2, see *id.* at 47a, 82a-83a.[1] The district court did

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[1] The district court's opinion also stated that the Korbel Plan's proposed Hispanic districts "are irregularly shaped, evidencing a lack of geographic compactness," Pet. App. 37a, and that the population of those districts deviated from the ideal district population in PISD by about 32%, *id.* at 38a. It is not clear, however, whether the district court ruled in the alternative that for those reasons petitioners had failed to establish that it was possible to draw an appropriate single-member district as a remedy for a Section 2 violation. The district court's conclusions of law reiterated that "[d]rawing majority-minority districts requires a minority population that is of sufficient size and compactness to allow for the construction of a compact and contiguous district in which the minority group can form an effective voting majority," *id.* at 82a, but it did not explicitly hold that petitioners had failed to establish

not discuss petitioners' evidence that Hispanic voters in existing comparable districts with less than a majority Hispanic CVAP had succeeded in electing representatives of their choice.[2]

Even though the district court ruled that petitioners failed to satisfy the threshold requirement under *Gingles* for establishing a Section 2 violation, the court also undertook an extensive analysis of the other *Gingles* factors (Pet. App. 47a-69a) as well as the totality of the circumstances surrounding the PISD

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a Section 2 violation because the districts in the Korbel plan were underpopulated or irregular in shape. The district court's ultimate conclusion was that petitioners "have not proven that it is possible to create a single-member district in which the majority of voting-age citizens is Hispanic," *id.* at 87a, suggesting that its principal concern was that petitioners had not drawn a district with a Hispanic majority CVAP. Further, the court of appeals did not address either the issue of compactness or that of excessive deviation from the ideal population, but ruled solely on the ground that the districts in the Korbel plan did not have a majority Hispanic CVAP. *Id.* at 11a. If this Court were to reverse that conclusion and remand for further proceedings, it would presumably be open to the parties on remand to address whether the demonstration districts in the Korbel plan were insufficient for other reasons, and whether those insufficiencies, if shown, would prevent the establishment of a Section 2 claim.

[2] Petitioners urged the district court to consider evidence of population trends since the 1990 census, which showed that the Hispanic percentage of the VAP and CVAP in PISD had increased. Pet. App. 38a-39a. The district court observed that, because of the passage of several years and substantial population shifts, the 1990 census data probably did not accurately reflect the demographics of the current population of PISD. *Id.* at 41a, 44a. The court nonetheless found that the 1990 census data provided "the most reliable estimate" of population information available, *id.* at 47a, and it therefore declined to rely on petitioners' proffered evidence of projected population trends in PISD instead of the census data, *ibid.*

election system (*id.* at 69a-82a). Based on that analysis, the court ruled that the Hispanic minority in PISD was politically cohesive (*id.* at 84a). The court did not reach a definitive conclusion whether the Anglo majority voted as a bloc to defeat the candidates preferred by Hispanics (*id.* at 85a), although it did find that "Anglo voters generally have not voted for Hispanic candidates in the PISD elections" (*id.* at 69a). The court further concluded that Hispanics have been consistently underrepresented on the PISD board (*ibid.*). Finally, the court stated that petitioners had raised "serious and valid concerns that hindrances to equal opportunity to participate in the political process [in PISD] are present" (*id.* at 87a), including "[t]he small number and inconvenient location of polling places, the short polling hours, the absence of minority election officials, and the incumbents' campaign-fund pooling system" (*ibid.*). Despite those observations, the district court ultimately found no Section 2 violation, because petitioners had failed to identify a single-member district that could be drawn with a majority Hispanic CVAP (*ibid.*).

3. The court of appeals affirmed. Pet. App. 1a-15a. The court stated that "[a]s a matter of law, the use of at-large voting can impede the ability of minority voters to elect representatives of their choice only if the plaintiffs demonstrate that the group meets the three *Gingles* requirements." *Id.* at 9a. With respect to the first *Gingles* requirement that it be possible to draw a single-member district with a majority of the minority group, the court ruled that courts considering a vote dilution claim "must consider the citizen voting-age population of the group challenging the electoral practice when determining whether the minority group is sufficiently large and geographically compact to constitute a majority." *Id.* at 10a. That rule, the court

stated, is compelled by the plain language of Section 2. *Ibid.*

The court also rejected as irrelevant petitioners' evidence of election results in similar districts in which Hispanics, although less than a majority of the CVAP, had succeeded in electing representatives of their choice. Pet. App. 10a-11a. The court stated that evidence of populations and elections from other jurisdictions might be relevant to determine whether Hispanics reached the threshold of a majority of the CVAP in a proposed single-member district, if no more direct evidence on that point were available, but "evidence that the group may succeed in electing preferred candidates cannot remedy its failure to meet the [first] *Gingles* threshold." *Id.* at 11a. The court therefore affirmed the district court's judgment in favor of respondents. *Ibid.*

DISCUSSION

This case presents the same issues as those presented in *Valdespino* v. *Alamo Heights Independent School District*, No. 98-1987. As we explain in our brief in response to the Court's invitation in *Valdespino* (at 5-18), those issues warrant this Court's review. The court of appeals panel in this case, like the panel in *Valdespino*, held that petitioners could not establish a Section 2 vote dilution claim solely because they could not show that Hispanics would constitute a majority in a single-member district, and ruled irrelevant evidence put forward by petitioners that Hispanic voters in a similar single-member election district, although not constituting the majority in that district, had been able to elect representatives of their choice. Pet. App. 11a. The court of appeals reached that conclusion in this case, moreover, even though the district court had

found considerable cause for concern that the totality of circumstances surrounding the election system in PISD prevented Hispanics from participating equally in the political processes. *Id.* at 87a. We also explain in our brief in *Valdespino* (at 10-14) that the absolute 50% rule applied by the court of appeals in this case and in *Valdespino* is erroneous. Accordingly, the Court should grant certiorari to decide whether a minority plaintiff is barred from establishing a Section 2 vote dilution claim without proof that the minority would constitute the majority of a single-member district, or whether such a plaintiff can pass the first threshold requirement of *Gingles* by pointing to evidence that the minority has been able to elect representatives of its choice in a district with similar demographics, even though it does not constitute the majority in that comparison district.

It may also be necessary for the Court to decide in this case, as it may be in *Valdespino*, whether a court hearing a Section 2 vote dilution claim must look to the single-member district's CVAP to determine whether plaintiffs have satisfied that first threshold requirement of *Gingles*. As in *Valdespino*, if this Court were to agree with the court of appeals that a vote dilution plaintiff must show that the minority could constitute an absolute numerical majority of a single-member district, then the question would necessarily arise as to how the plaintiff may show that the minority could constitute the "majority"—*i.e.*, whether the minority must make up the majority of the total population, VAP, or CVAP of such a district. See U.S. Br. at 14-16, *Valdespino*.[3]

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[3] As in *Valdespino*, that question is less likely to be significant in this case if this Court holds that a Section 2 vote dilution claim

As we explain in our brief in *Valdespino* (at 16-17), although it is clearly the right of citizens to vote that is pertinent to the concept of vote dilution under Section 2, there are some significant practical difficulties with a rule that would require courts in all circumstances to rely on CVAP data from the census to determine whether a minority group could elect a representative of its choice from a single-member district. Moreover, this case may present a circumstance in which the CVAP data relied on by the district court did not give the court a fully accurate understanding of whether it is possible to draw a single-member district in which a minority could elect a representative of its choice. The district court relied on a regression analysis prepared by respondents' expert to conclude that approximately 60% of the Hispanic VAP in petitioners' demonstration district are citizens. See Pet. App. 35a-37a. The regression analysis used by the district court, however, yielded a citizenship rate for Hispanics in the entire PISD, which is a much larger area than the two

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does not require the minority to be an absolute numerical majority in a single-member district. Petitioners have shown that Hispanics would be very close to a majority of the CVAP of their demonstration district, and have also submitted evidence to show that Hispanics in a comparison district with a similar Hispanic percentage of CVAP have elected a representative of their choice. Even if the Court agrees with us that the court of appeals' 50% rule is unwarranted, however, the question whether a court hearing a Section 2 vote dilution claim should look to CVAP or VAP may nonetheless have significance in some cases. To establish a vote dilution claim, the plaintiff must show that the minority would be "sufficiently large" in a single-member district. *Gingles*, 478 U.S. at 50. At some point the minority population may simply be too small in any single-member district to elect its representative of choice, and the question whether a court should look to CVAP or VAP to make that determination may be important in some cases.

demonstration single-member districts proffered by petitioners. See *ibid.* The district court does not appear to have considered any evidence directly establishing the citizenship rates for Hispanics specifically in the demonstration districts. The regression analysis used by the district court may have masked the possibility that citizenship rates for Hispanics are higher among the population located in those two demonstration districts than elsewhere in the PISD, and that Hispanics in those districts would have had the potential to elect a representative of their choice.

CONCLUSION

The petition for a writ of certiorari should be granted.

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IN THE

Supreme Court of the United States

ROSALINDA L. PEREZ, *et al.*,

Petitioners,

v.

PASADENA INDEPENDENT SCHOOL DISTRICT, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENTS' SUPPLEMENTAL BRIEF IN RESPONSE TO THE BRIEF OF THE UNITED STATES AS *AMICUS CURIAE*

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The amicus curiae brief of the United States suggests several reasons for this court to grant certiorari in *Perez v. Pasadena Independent School District*. The suggestions of the Solicitor General are based upon a record that was not fully developed and was considered unreliable by the trial court to permit the Court's meaningful review and resolution of the issues highlighted by the United States.

I.

THE RECORD IN *PEREZ* IS NOT FULLY DEVELOPED ON THE ISSUE THE UNITED STATES ASKS THE COURT TO ADDRESS

The United States urges this Court to set aside and reverse its holding in *Thornburg v. Gingles*, 478 U.S. 30 (1986) and thus eliminate the standards and prerequisites set forth in *Thornburg* and upheld/subscribed to in the various appellate courts that have faced these issues since *Thornburg*. The United States urges this Court to grant certiorari to decide whether a minority plaintiff is barred from establishing a Section 2 vote dilution claim without proof that the minority would constitute the majority of a single-member district, or whether such a plaintiff can pass the first threshold requirement of *Gingles* by pointing to evidence that the minority has been able to elect representatives of its choice in a district with similar demographics even though it does not constitute the majority in that comparison district. The major problem with this theory is that the petitioners in *Perez* did not try their case, or develop a record on this theory. Petitioners argued that they could demonstrate the existence of a majority. Petitioners never offered any evidence that less than a majority could be used to prove a Section 2 vote dilution claim. The United States refers to specific elections in its effort to sway this Court (Brief of the United States at 3). No data or information is known about these elections except that minorities were elected. The United States presents no analysis as to cross-over voting, cohesions of the

minorities or other factors involved in these alleged similar districts that lead to the election of these minorities. The record was not fully developed regarding these elections and therefore, the Court should not place weight or value in these particular elections.

In its footnote number 1, p. 4 of its brief, the United States addresses the fact that neither the trial court nor the Fifth Circuit held that the Petitioners established a violation of Section 2 based upon the Korbel proposed districts. Both the trial courts and the Fifth Circuit addressed the issue of the Korbel proposed district and held they could not meet the burden of *Gingles I*. These proposed districts evidenced a lack of geographic compactness. The trial court did not address *Gingles III* because the burden of meeting *Gingles I* was not met and hence, it was not necessary to analyze any further requirements of *Gingles*.

The Korbel plan was analyzed by the trial court in detail and found to be unreliable. There is no basis to remand for lack of consideration by either the trial court or the Fifth Circuit.

The United States bases its total argument on the testimony of Petitioners' expert witness, George Korbel. The Korbel plan was described by the District Judge as offering projections that resulted in unreliable estimates that offered only a "talismanic measure," of the population. (Pet. brief p. 47) The Korbel plan would have to incorporate magical and miraculous manipulations to meet *Gingles I*. The Court further found the Petitioners' evidence did not provide reliability to overcome the presumption of the census accuracy.

The trial court could not, after carefully considering Petitioners' evidence, find it reliable. This Court should not render a decision based upon this unreliable and unacceptable evidence.

The United States points out that the school district, at the time of trial, had inconvenient polling places, short polling hours and the absence of minority election officials (brief of the United States at 6). Since the trial, these issued have been considered and changed by the PISD Board of Trustees.[1]

II.

THE CVAP DATA RELIED ON BY THE DISTRICT COURT DID PROVIDE THE DISTRICT COURT A FULLY ACCURATE UNDERSTANDING OF WHETHER IT IS POSSIBLE TO DRAW A SINGLE MEMBER DISTRICT TAKING CITIZENSHIP INTO ACCOUNT AND WAS NOT CONTROVERTED IN THIS CASE

Early on in this case, in the absence of actual citizenship data from the census bureau, regression estimates of the sort referred to in the United States brief were utilized by Respondents (United States brief at 9). However, at the trial Respondents produced an analysis of the actual districts proposed by the Petitioners utilizing the census special tabulations of citizenship at the block group level to demonstrate the inability of Petitioners to form a majority in their proposed districts. In addition, when the trial was continued in February of 1997 to consider additional evidence, both Petitioners and Respondents were utilizing the same census data on citizenship (Tr. Ex 75).

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1. It has been pointed out that in Respondent's brief, p. 3, footnote 1, there was a significant increase in polling places (from 4 to 10). The increase in the number of polling places resulted in a significant reduction in Hispanic voter turnout. Quite significantly, this actually resulted in a reduction in Hispanic voter turnout (dropping from 7.4 percent to 6.2 percent). In addition, both the hours of voting and the number of early voting places were expanded. The school district also made extensive efforts to obtain Hispanic election officials, but the Hispanic community showed no interest in participating.

Further, in both the trial court and in Petitioners brief, Petitioners have not made the argument being advanced by the United States that the regression analysis used by the district court may have masked the possibility that citizenship rates for Hispanics are higher among the population located in their two demonstration districts than elsewhere in the PISD, and that Hispanics in these districts would have had the potential to elect a representative of their choice.

The United States addresses the question as to whether, in determining *Gingles I*, the courts should consider voting age population (VAP) or citizen voting age population (CVAP). This case is a voting rights act case. Only citizens can vote and only citizens can bring an action under the voting rights act. Every appellate court that has addressed this issue, has considered only CVAP. The United States has offered no reason, whether legal or otherwise, to support its position of setting VAP as the standard for determining a violation of Section 2. If this Court sets VAP as a standard for determining a violation of the Voting Rights Act, it will have the effect of diluting the "one man, one vote" theory and, as a result, diminish the rights of voting citizens. On its face it appears patently absurd to argue that the courts should utilize VAP and not CVAP to show that the minority could constitute the "majority" of a proposed single member district. The Court should consider only those persons eligible to vote. In addition, in those areas where the issue of citizenship arises, it provides the Court with a clear and concise standard in measuring the true potential of the ability of the minority to elect the candidate of their choice.

The United States, in its argument for the VAP standard, states that "there are some significant practical difficulties with a rule that would require CVAP." The brief does not state what these difficulties may be and where the United States has raised this issue in other cases, they have enumerated difficulties that do not apply to a Section 2 vote dilution claim.

If there are any practical difficulties, these can be easily remedied by making available the citizenship census data at the same time the remainder of the census data is made available (Respondent's brief at p. 9).

CONCLUSION

The brief filed by the United States does not contain one citation from any case, statute, constitutional provision or any other legal authority to support its position. The United States is making a political rather than legal argument. In its brief, the United States has taken the position that the absolute 50% rule applied by the court of appeals in this case and in Valdespino is erroneous (United States brief at 8). The United States has not attempted to explain or cite any authority as to how or in what manner the 50% rule applied by the court of appeals in this case is erroneous. In effect, the United States is basing its argument on what appears to be administrative policy and not legal argument. In its brief, the United States has failed to address the importance of the citizenship issues raised by Respondents and how this issue impacts on the ability of the Hispanic citizens to elect the candidates of their choice. Should this Court elect to reverse its holding in *Gingles* and allow less than a majority of minority voters to prove a Section 2 vote dilution claim, it will have the effect of creating the illusion of a remedy and will further impede the ability of the Hispanic citizens to elect the candidate of their choice. To allow less than a majority of minority voters to prove a Section 2 vote dilution claim will also eliminate the standard for harm. The *Gingles I* threshold addresses both the potential to elect and whether the challenged election system has damaged the plaintiffs in a voting rights case. Absent an actual majority of CVAP, plaintiffs in a Section 2 vote dilution claim cannot demonstrate that they have in fact been harmed by the challenged election system.

The Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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